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(REPORTS)

(The Supreme Court.)

II] JULY [1965

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—RAGHUBAR DAYAL, J. R. MUDHOLKAR AND S. M. SIKRI, JJ.

Deochand and another .. *Petitioners**

v.

Shiv Ram and others .. *Respondents.*

Supreme Court Rules, Order 45, rule 5—Inherent powers of Supreme Court—Direction in regard to execution and stay of decree executed already pending appeal before Supreme Court—No directions sought for or given in the High Court—Inherent power of Supreme Court, to grant.

Civil Procedure Code (V of 1908), Order 45, rule 13—Appeal to Supreme Court—Directions in connection with execution of decree can be given only on existence of special cause—No power to give after execution of the decree.

Order 45, rule 5 of the Supreme Court Rules, provides that the inherent powers of the Supreme Court, to make necessary orders to meet the ends of justice or to prevent abuse of the process of the Court, are not affected by the rules. Order 20, rule 1 deals with the question of staying the execution of a decree. There is no rule which provides for the Supreme Court giving directions in connection with the execution of the decree. When the Civil Procedure Code sufficiently deals with the right of the decree-holder to execute the decree and the powers of the High Court to give directions in connection with such execution, the existence of such an inherent power in the Supreme Court would be a matter of grave doubt. No occasion for the exercise of any inherent power can arise when the High Court itself does not give any such directions and had not been asked by the judgment-debtor appellant to stay the execution of the decree.

The provisions of rule 13 of Order 45 of the Code emphasise that the decree-holder has, ordinarily, full right to execute the decree, unless suitable directions in connection with the execution and stay of it are obtained at the instance of the opposite party, on his showing the existence of special cause. The High Court is also not empowered to give such directions subsequent to the execution of the decree.

Appeal from the Judgment and Decree dated 31st August, 1962, of the Madhya Pradesh High Court in S.A. No. 597 of 1960.

Navnit Lal, Advocate, for Petitioners.

The Order of the Court was pronounced by

Raghubar Dayal, J.:—This application purports to be one under Order 45, rules 2 and 5 of the Supreme Court Rules and contains the following prayers :

(i) to direct the respondents to furnish security for delivering possession of the lands in dispute and for payment of mesne profits and costs which the petitioners might get in appeal ;

(ii) to restrain the respondents from transferring the lands in dispute or creating any charge on the said lands pending the decision of the appeal in this Hon'ble Court ;

* C.M.P. No. 1228 of 1964. 25th August, 1964.

(iii) to send for the record of the case and get the record printed under the supervision of this Hon'ble Court ;

(iv) to order an early hearing of the case.

Prayers Nos. (i) and (ii) appear to have been made in view of rule 5 which provides that nothing in the Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

The respondents-decree-holders have obtained possession over the land in suit in execution of the decree in their favour. The petitioners did not take any action under Order 45, rule 13 (2), Civil Procedure Code, at the time the respondents-decree-holders applied for execution. If they had applied to the High Court for the stay of execution, the High Court could have either allowed execution on taking security from the respondents for the due performance of any order which this Court might have made on the appeal or might have stayed the execution of the decree on taking security from the petitioners-appellants for the due performance of the decree appealed from or of any decree or order which this Court might make on the appeal. The question arises whether, after the decree has been executed and the decree-holders have been put in possession by the Court, this Court can put the respondents-decree-holders to terms and direct them to furnish security for their delivering possession of the land in dispute and for payment of mesne profits, if the appeal succeeds and whether the Court can restrain the respondents-decree-holders from transferring the lands in dispute, pending the decision of the appeal in this Court.

A notice of this petition was served on the respondents-decree-holders, but they did not put in appearance.

Mr. Naunit Lal, for the petitioners, has referred us to some cases and to the provisions of the Code of Civil Procedure, in this connection. Reliance is chiefly placed on the case of *Mst. Jariut-ool-Butool* v. *Mst. Hosseinee Begum*[1], which was followed by the Madras High Court in *Narayanan Chetti* v. *Arunachellam Chetti*[2], and by the Bombay High Court in *Khushaldas Gokuldas* v. *Chimanlal Kalidas*[3], in a case which came before it after the enactment of the Code in 1908. In the Privy Council case, the Privy Council expressed the opinion that the Sadar Dewani Adalat was competent to require the decree-holder to furnish the security or otherwise to provide for the protection and security of the property in question pending the appeal, notwithstanding that execution had issued before the appeal was allowed. Their Lordships of the Privy Council did not express themselves with respect to the reasons for the view and simply stated that they had felt some difficulty in dealing with the case, but on examining the Regulations and considering the nature of the case, they were of opinion that an order might be made upon the application. The Regulations referred to in the submissions before their Lordships were the Bengal Regulation XVI of 1797, Bengal Regulation XIII of 1808, section II, clause (3) and Bengal Regulation V of 1798, sections V and VI. Section II of the Bengal Regulation XVI of 1797 provided for persons desirous of appealing from a judgment of Sadar Dewani Adalat to the King-in-Council to present their petition of appeal to the Court of Sadar Dewani Adalat which was empowered to admit the appeal and proceed upon it as directed in the following sections of that Regulation, under the several restrictions therein prescribed. Section IV of the Regulation provided :

"In cases of appeal to his Majesty-in-Council, the Court of Sudder Dewanny Adawlut may either order the judgment passed by them to be carried into execution, taking sufficient security from the party in whose favour the same may be passed for the due performance of such order or decree as his Majesty, his heirs or successors, shall think fit to make on the appeal, or to suspend the execution of their judgment during the appeal, taking the like security in the latter case from the party left in possession of the property adjudged against him."

We find nothing in these provisions which empowered the Court of Sadar Dewani Adalat to demand security from the respondent-decree-holders or to restrain them from transferring any property over which they had obtained possession in execution of their decree before an appeal was taken to the Privy Council.

1. 10 M.I.A. 196.
2. (1895) I.L.R. 19 Mad. 140.
3. (1926) I.L.R. 50 Bom. 453.

Section IV, however, directed the Sardar Dewani Adalat to allow the execution of the decree on taking sufficient security from the decree-holder. In the case before the Privy Council no such security had been taken and therefore it may be said that the Court was held to be competent to cover up its default by ordering the security to be furnished by the decree-holders even after the decree had been executed. Bengal Regulation XIII of 1808 dealt with the procedure in cases which were appealable to the Court of Sadar Dewani Adalat and could not possibly have said anything in connection with the appeals to the Privy Council from the orders of the Sadar Dewani Adalat. Section V of Bengal Regulation V of 1798 provided for the applicability of the principles of the rules contained in Sections III and IV to cases in which the possession of property was ordered to be transferred by the decree of any Court of justice and from which decree an appeal be pending in a superior Court including his Majesty-in-Council. Section III of the Regulation empowered the Courts of appeal to require further security during appeals if the security already taken from the appellant for the stay of execution of the decree be found to be insufficient and in case of the failure of the appellant to furnish further security to allow the execution of the decree, on taking requisite security from the respondent. Section IV of the Regulation made the transfers by the appellant, pending the appeal, to be null and void.

We do not see how these provisions of sections III, IV and V of Regulation V of 1798 could have been any guide in the matter before the Privy Council. Section VI of this Regulation provides for the attachment of the property in case neither of the parties were able to furnish security. This provision, again, could not have been of any help in determining the question whether the High Court could require the decree-holders to furnish security after the decree had been executed.

Order 45, Civil Procedure Code, deals with matters in connection with appeals to this Court. Rule 13 deals with the powers of the Court whose decree is under appeal, during the pendency of that appeal, and reads :

> "13. (1) Notwithstanding the grant of a certificate for the admission of any appeal, the decree appealed from shall be unconditionally executed, unless the Court otherwise directs.
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> (2) The Court may, if it thinks fit, on special cause shown by any party interested in the suit, or otherwise appearing to the Court,—
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> (*a*) impound any movable property in dispute or any part thereof, or
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> (*b*) allow the decree appealed from to be executed, taking such security from the respondent as the Court thinks fit for the due performance of any order which the Supreme Court may make on the appeal, or
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> (*c*) stay the execution of the decree appealed from, taking such security from the appellant as the Court thinks fit for the due performance of the decree appealed from, or of any decree or order which the Supreme Court may make on the appeal, or
>
> (*d*) place any party seeking the assistance of the Court under such conditions or give such other direction respecting the subject-matter of the appeal, as it thinks fit, by the appointment of a receiver or otherwise."

It is clear from sub-rule (1) that unless the Court otherwise directs the decree has to be unconditionally executed. Naturally, directions of the Court must be given before the execution of the decree. If no directions are given, the execution of decree is unconditional, which means that the decree-holder executes the decree without any conditions attached and, after executing the decree, can deal with the property he has obtained on such execution, in such manner as the law allows him to deal with it. Sub-rule (2) lays down the circumstances in which the Court can give directions with respect to the subject-matter of the suit, including the execution of the decree. Clauses (*b*) and (*c*) provide respectively that security may be taken from the respondent for the execution of the decree and that the execution of the decree may be stayed on taking security from the appellant for the due performance of any decree which this Court might make on appeal. Such a direction for security for the due performance of the order eventually passed by this Court is to be given when the Court is dealing with the question whether the execution of the decree be allowed or be stayed. The sub-rule does not empower the Court to give such a direction subsequent to the execution of the decree. Even the giving of such direc-

tions, when dealing with an application for execution, is dependent on the satisfaction of the Court that some special cause exists for giving those directions. The provisions of rule 13 emphasize that the decree-holder has, ordinarily, full right to execute the decree unless, on special cause being shown, the Court orders him to furnish the security contemplated by clause (*b*) of sub-rule (2). Rule 14 provides for the increase of the security furnished by either party when it is found to be inadequate. If the appellant fails to deposit the additional security ordered, the decree is to be executed and if it is the decree-holder-respondent who defaults to furnish the additional security, the Court can stay the further execution of the decree and restore the parties to the position in which they respectively were when the security which appeared inadequate was furnished or give such directions respecting the subject-matter of the appeal as it thought fit. The rule comes into play only when security had been furnished in the first instance by the decree-holder-respondent or by the judgment-debtor-appellant and does not deal with cases where execution had been allowed by the Court without imposing any condition. The Legislature could have provided in this rule or any other rule for the Court demanding security afresh if circumstances came into existence during the pendency of the appeal providing justification for the demand of security from the decree-holder-respondent who had executed his decree. It does not so provide.

So far we have been dealing with the powers of the High Court and the Courts from whose orders, appeals, be pending in this Court. We have not been referred to any decision of this Court in which this Court had ordered any decree-holder to furnish security for the due performance of the decree that might be passed by the Court when the decree-holder had already executed his decree. Nor have we been referred to any provision of law dealing with this question. Order 20, rule 1, Supreme Court Rules however deals with the question of staying the execution of a decree and reads :

"The filing of an appeal shall not prevent execution of the decree or order appealed against but the Court, may, subject to such terms and conditions as it may think fit to impose, order a stay of execution of the decree or order, or order a stay of proceedings, in any case under appeal to the Court."

There is no rule which provides for this Court's giving directions in connection with the execution of the decree. In fact, no such occasion can arise as the decree-holder is free to execute his decree and the powers of the Court whose decree is under appeal, in connection with the execution application, are laid down in Order 45, of the Code.

Order 45, rule 5, of the Supreme Court Rules, simply provides that the inherent powers of this Court, to make necessary orders to meet the ends of justice or to prevent abuse of the process of the Court, are not affected by the Rules. Mr. Naunit Lal has not urged that the reliefs prayed for with respect to the demanding of the security from the respondents or restraining them from transferring the property, were to be granted in the exercise of the inherent powers of this Court. The existence of such an inherent power would be a matter of grave doubt when the Code sufficiently deals with the right of the decree-holder to execute the decree and the powers of the High Court to give directions in connection with such execution. No occasion for the exercise of any inherent power can arise when the High Court itself does not give any such directions and had not been asked by the judgment-debtor appellant to stay the execution of the decree. To exercise any such inherent power would be not for the prevention of the abuse of the process of the Court but may be to encourage it inasmuch as the judgment-debtor who had been in default in taking, necessary action at the proper time would be encouraged to ask for that action after the execution of the decree and during the pendency of the appeal in this Court. Law contemplates transfers by a party pending litigation, does not prohibit them but makes them subject to the result of the litigation. To pass orders restraining a party in possession delivered by the Court cannot, *prima facie*, be in the interests of justice.

We are therefore of opinion that the aforesaid reliefs cannot be granted after the decree-holders had been put in possession of the property in suit in due execu-

tion of their decree. We may note that the failure of the appellants to obtain such reliefs from this Court need not necessarily prejudice them in case they succeed in the appeal. Any transfers of the property in suit made by the respondent-decree-holders during the pendency of the appeal would be subject to the law of *lis pendens*. The appellants would be entitled to recover such mesne profits, as the law allows, from the respondents for the period of their possession. We therefore reject this application with respect to the reliefs mentioned in clauses (i) and (ii) of para. 11 of the application.

We have not considered whether any other reliefs, for the protection of the interests of the petitioners-appellants, can be granted, as no other reliefs in that regard had been sought.

With respect to the prayer in clause (iii), we order that the record of the case be sent for and the papers for use of this Court be printed under the supervision of the Registrar.

With regard to the prayer in clause (iv), the petitioners-appellants can take proper steps after the printing of the record.

V.S. ——— *Application dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—RAGHUBAR DAYAL, J. R. MUDHOLKAR, R. S. BACHAWAT AND V. RAMASWAMI, JJ.

The United Bank of India, Ltd. .. *Appellant**

v.

M/s. Lekharam Sonaram & Co. and others .. *Respondents.*

Transfer of Property Act (IV of 1882), *section* 58 (*f*)—*Mortgage by deposit of title deeds—Essentials—Proof—Written contract and registration under section* 17 *of Registration Act* (*XVI of* 1908) *—Necessity.*

A mortgage by deposit of title deeds is a form of mortgage recognised by section 58 (*f*) of the Transfer of Property Act which provides that it may be effected in certain towns (including Calcutta) where a person " delivers to a creditor or his agent documents of title to immovable property with intent to create a security thereon." In other words, when the debtor deposits with the creditor title deeds of his property with an intent to create a security the law implies a contract between the parties to create a mortgage and no registered instrument is required under section 59 as in other classes of mortgage. The essence of a mortgage by deposit of title deeds is the actual handing over by a borrower to the lender of documents of title to immovable property with the intention that those documents shall constitute a security which will enable the creditor ultimately to recover the money which he has lent. But if the parties choose to reduce the contract to writing, this implication of law is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. It follows that in such a case the document which constitutes the bargain regarding security requires registration under section 17 of the Registration Act, 1908, as a non-testamentary instrument creating an interest in immovable property, where the value of such property is one hundred rupees and upwards. If a document of this character is not registered it cannot be used in evidence at all and the transaction itself cannot be proved by oral evidence either.

The letters written by the mortgagors to the mortgagee in the instant case were not intended by the parties to be an integral part of the transaction of mortgage by deposit of title deeds and did not, by themselves, operate to create an interest in the immovable properties mortgaged and so they did not require registration under section 17 of the Registration Act for the purpose of being introduced in evidence.

Appeal from the Judgment and Decree dated the 12th March, 1958, of the Patna High Court in Appeal from Original Decree No. 371 of 1950.

A. V. Viswanatha Sastri, Senior Advocate (*B. P. Jha*, Advocate with him), for Appellant.

K. K. Sinha, Advocate, for Respondents Nos. 3 (*a*), 8 (*a*) and 8 (*c*).

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* C. A. No. 83 of 1962. 1st February, 1965.

The Judgment of the Court was delivered by

Ramaswami, J.—In the suit which is the subject-matter of this appeal the plaintiff alleged that on 11th August, 1945, the defendants created an equitable mortgage to secure advances made by the plaintiff up to the limit of one lakh of rupees as overdraft to carry on their business. It was further alleged that the mortgage was created by the deposit of two title deeds at Calcutta on 11th August, 1945, with regard to two houses and there was a letter of authority dated 9th August, 1945 (Exhibit 7 (*a*)) as addressed by defendant No. 2—Lekharam to the plaintiff authorising defendant No. 4—Babulal Ram to deposit the title deeds. On 10th August, 1945, Sonaram—defendant No. 3, brother of defendant No. 4, addressed a letter to the Manager of the plaintiff-bank authorising defendant No. 4.—his younger brother—to deliver the title deeds for deposit and "to negotiate further in this respect." The letter of Sonaram is Exhibit 7 (*b*). On 11th August, 1945, Babulal Ram, defendant No. 4, wrote a letter (Exhibit 12) addressed to the Manager of the plaintiff-bank containing the schedule of documents said to have been deposited with the plaintiff-bank at Calcutta—namely, the title deeds of 17th September, 1927, and 13th December, 1937. The suit was contested by the defendants on the ground that the title deeds were not deposited at Calcutta with a view to create an equitable mortgage, and that in any case, the document—Exhibit 7 (*a*) constituted a bargain between the parties and required registration under section 17 of the Registration Act. It was contended on behalf of the defendants that in the absence of the registration the plaintiff was not entitled to a mortgage decree.

The trial Court considered that Exhibits 7 (*a*) and 7 (*b*) were not merely a record of past transactions but created an equitable mortgage and, therefore, required registration under section 17 of the Registration Act. The trial Court, therefore, granted a money decree in favour of the plaintiff for the amount claimed in the plaint along with interest at 6 per cent. per annum from the date of the decree and costs. The plaintiff took the matter in appeal before the High Court which expressed the view that Exhibits 7 (*b*) and 12 were not of much consequence and Exhibit 7 (*a*) was the material document to be construed in the case and the High Court took the view that Exhibit 7 (*a*) written by Lekharam, defendant No. 2, was meant to be an integral part of the transaction and was not intended to be mere evidence for the deposit of the title deeds. The High Court accordingly held that the plaintiff was not entitled to a mortgage decree and therefore dismissed the appeal.

The letter written by Lekharam—Exhibit 7 (*a*)—on 9th August, 1945, reads as follows :

"I hereby authorise my son Mr. Babulal Ram to deposit with you on my behalf at your Calcutta office the following title deeds with a view to create an equitable mortgage on the said properties to make your advances in the A/C of Messrs. Lekharam Sonaram & Co., Giridih, better secured. I hereby further declare that I am the sole owner of the Giridih property as per schedule below and am legal joint heirs with my sons dealing in the name of Messrs. Lekharam Sonaram & Co. of the Malho property as described in the schedule below. I hereby further declare that both the properties described in the schedule are free from all encumbrances and nobody else has any claim, right or title to the properties. And I hereby declare that the deposit will give you a valid legal title over my said properties as mortgagee until all the obligations of the Messrs. Lekharam Sonaram & Co. with your Giridih branch are duly satisfied.

Particulars of Properties.

1. Giridih property.
2. Malho Property."

On 10th August, 1945, Sonaram, defendant No. 3, brother of defendant No. 4, addressed a letter [Exhibit 7 (*b*)] to the plaintiff-bank to the following effect :

"We hereby authorise Mr. B.L. Gupta, my younger brother to deliver you the title deeds for depositing and to negotiate with you further in this respect. We hope, you will do the needful and oblige us.

Your Mr. Basak, had been to our Office and assured us to allow us an extra O/D against our Mica Stock, for another, Rs. 40,000. We have already had the facility of a lac for which we thank you but still, it is insufficient for the volume of our business.

We hope, you will surely extend your favour and make us one of your obliged clients,

Thanking you once more.

N.B.—Though Rs. 40,000 will not serve our purpose, we request Mr. Basak to increase it further. At this for the time being he asked us to manage with it and later on he will raise it further.

Yours faithfully,
(*Sd.*) Lekharam Sonaram & Co.
(*Sd*) Sonaram, Partner."

On 11th August, 1945 another letter—Exhibit 12 was written by Babulal Ram—defendant No. 4—to the Manager of the plaintiff-bank to the following effect :—

"This is to place on record that I have this day deposited with you at your Head Office at Clive Street, Calcutta, the undernoted documents of title relating to my properties *viz.*, Giridih Malho properties as described in the title deeds with intent to create an equitable mortgage upon all my rights, title and interest in the said properties to secure due repayment on demand of all moneys now owing or which shall at any time hereafter be owing from me or from M/s. Lekharam Sonaram & Co. either singly or jointly or otherwise to Bengal Central Bank Limited, whether on balance of account or by discount or otherwise in respect in any manner whatsoever and including interest with monthly rests commissions and other Banking charges and any law costs incurred in connection with the account. I do hereby put on record that the properties mentioned below are free from all encumbrances.

Yours faithtully,
Bapulal Ram.

Schedule of documents :—

1. Hindi sale deed dated 17th September, 1927, from Sonaram V. Gangal Ram to Babu Hemon Ram.

2. Hindi sale deed from Mosammat Bhim Kumari to Babu Lekharam, dated 13th December, 1937."

The main question presented for determination in this case is whether the view taken by the High Court as to the legal effect of these documents—Exhibits 7 (*a*), 7 (*b*) and 12 is correct.

A mortgage by deposit of title deeds is a form of mortgage recognised by section 58 (*f*) of the Transfer of Property Act which provides that it may be effected in certain towns (including Calcutta) where a person " delivers to a creditor or his agent documents of title to immovable property with intent to create a security thereon." In other words, when the debtor deposits with the creditor title deeds of his property with an intent to create a security the law implies a contract between the parties to create a mortgage and no registered instrument is required under section 59 as in other classes of mortgage. It is essential to bear in mind that the essence of a mortgage by deposit of title deeds is the actual handing over by a borrower to the lender of documents of title to immovable property with the intention that those documents shall constitute a security which will enable the creditor ultimately to recover the money which he has lent. But if the parties choose to reduce the contract to writing, this implication of law is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. It follows that in such a case the document which constitutes the bargain regarding security requires registration under section 17 of the Indian Registration Act, 1908, as a non-testamentary instrument creating an interest in immovable property, where the value of such property is one hundred rupees and upwards. If a document of this character is not registered it cannot be used in the evidence at all and the transaction itself cannot be proved by oral evidence either. In the case of *Kedarnath Dutt* v. *Shamloll Khettry*[1], Couch, C. J., stated as follows :

"The rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement. If this memorandum was of such a nature that it could be treated as the contract for the mortgage and what the parties considered to be the only repository and appropriate

1. 11 Ben. L.R. (O.C.J.) 405.

evidence of their agreement, it would be the instrument by which the equitable mortgage was created, and would come within section 17 of the Registration Act."

In a later case, in *Pranjivandas Mehta* v. *Chan Ma Phee*[1], the Judicial Committee observed as follows :

"The law upon this subject is beyond any doubt : (1) Where titles are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title. (2) Where, however, titles are handed over accompanied by a bargain, that bargain must rule; (3) lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and extent of security.

In the words of Lord Cairns in the leading case of *Shaw* v *Foster*[2], although it is a well established rule of equity that a deposit of a document of title without more, without writing, or without word of mouth, will create in equity a charge upon the property referred to, I apprehend that that general rule will not apply when you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there was no document, is put out of the case and reduced to silence by the documents by which alone you must be governed."

In *Obla Sundaracharlar* v. *Narayanna Ayyar*[3], the plaintiff had verbally agreed at Madras to make a further advance to the defendants, making Rs. 60,000 in all, upon the deposit of certain documents of title. The defendants' agent signed and handed to the plaintiff a memorandum stating "As agreed upon in person I have delivered to you the undermentioned documents as security"—a list of the documents following, also a promissory note for Rs. 60,000. After examination of the documents the agreed amount was handed over to the defendants. It was held by the Judicial Committee that the memorandum was not a document which required registration, even if the agreed advance was conditional upon it being given ; and that, there being no written agreement, the memorandum as well as oral evidence, was admissible in evidence to prove the intent to create a security by deposit of the documents named. The same view was expressed by this Court in *Rachpal Mahraj* v. *Bhagwandas Daruka*[4], in which it was pointed out that the question whether a memorandum of deposit of title deeds is compulsorily registrable under section 17 of the Indian Registration Act, 1908, depends on whether the parties intended to reduce their bargain regarding the deposit to the form of a document. If so, the document required registration. If, on the other hand, its proper construction and the surrounding circumstances lead to the conclusion that the parties did not intend to do so, there being no express bargain, the document being merely evidential did not require registration. In that case, accounts were taken relating to the appellant's dealings with the respondents on a certain date and the appellant gave certain title deeds to the respondents for being held as security for the amounts then found due and which may become due, and on the same day the appellant gave a memorandum to the respondents in the form of a letter addressed to the respondents which stated as follows :

"We write to put on record that to secure the repayment of the money already due to you from us on account of the business transactions between yourselves and ourselves and the money that may hereafter become due on account of such transactions we have this day deposited with you the following title deeds in Calcutta at your place of business at No. 7, Sambhu Mullick Lane, relating to our properties at Samastipur with intent to create an equitable mortgage on the said properties to secure all moneys including interest that may be found due and payable by us to you on account of the said transactions........"

It was held by this Court that the parties did not intend to create a charge by the execution of the document, but merely to record a transaction which had already been concluded and under which rights and liabilities had already been created and the document did not require registration.

Applying the principle to the present case, we consider that the letter Exhibit 7 (*a*) was not meant to be an integral part of the transaction between the parties. The letter does not mention what was the principal amount borrowed or to be borrowed. Neither does it refer to rate of interest for the loan. It is important to notice that

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1. 31 M.L.J. 155 : (1916) L.R. 43 I.A. 122.
2. (1872) L.R. 5 H.L. 321, 341.
3. L.R. (1931) 58 I.A. 68 : I.L.R. 54 Mad. 257 : 60 M.L.J. 506.
4. (1950) S.C.R. 548 : (1950) S.C.J. 361 : (1950) 2 M.L.J. 350.

the letter does not mention details of title deeds which are to be deposited with the plaintiff-bank. We are therefore, of the opinion that the view of the High Court with regard to the construction of Exhibit 7 (*a*) is erroneous and the document was not intended to be an integral part of the transaction and did not, by itself, operate to create an interest in the immovable property. It follows, therefore, that the document—Exhibit 7 (*a*)—did not require registration under section 17 of the Indian Registration Act.

On behalf of the respondents it was argued in the alternative that Exhibits 7 (*b*) and 12 were integral parts of the transaction and would require registration. We are unable to accept this argument as correct. As the High Court has pointed out, the letter written by Sonaram—Exhibit 7 (*b*)—is not of much consequence, for it does not contain the material particulars of the loan and does not mention details of title deeds intended to be deposited with the plaintiff-bank. On the other hand, the letter—Exhibit 7 (*b*)—suggests that the transaction was not finally completed as Babulal Ram—defendant No. 4—was authorised in the letter " to negotiate further in this respect." As regards Exhibit 12 also, it is not possible to accept the argument of the respondents that it created a charge for the reason that the language in Exhibit 12 suggests that it recorded a transaction which had already been concluded and under which rights and liabilities had already been agreed upon. It is also significant that Exhibit 12 is written not by Lekharam—the Karta of the joint family—but by Babulal Ram. It recites that he had deposited the title deeds with an intent to create an equitable mortgage " upon all my rights, title and interest in the said properties." The language of Exhibit 12 is identical in material respects with the language of the document construed by this Court in *Rachpal Mahraj* v. *Bhagwandas Daruka*[1] and is covered by the decision in that case. We accordingly reject the argument addressed by the learned Counsel for the respondents on this aspect of the case.

For the reasons expressed we hold that the view taken by the High Court must be overruled and the plaintiff must be granted a mortgage decree for the amount of Rs. 31,000 odd, as claimed in the plaint together with interest at 6 per cent. per annum from the institution of the suit and costs. The plaintiff is accordingly granted the usual mortgage decree under Order 34, rule 4, Civil Procedure Code, and it should be stated in the decree that if the defendants do not pay the amount within a period of six months from this date the mortgaged properties described in the schedule to the plaint would be sold for the satisfaction of the amount owing to the plaintiff.

We accordingly allow this appeal with costs.

V.K. *Appeal allowed.*

THE SUPREME COURT OF INDIA.

PRESENT :—K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.

Alapati Venkataramiah — *Appellant**

v.

Commissioner of Income-tax, Hyderabad ... *Respondent.*

Income-tax Act (IX of 1922), section 12-B—Capital gains—Buildings and machinery, furniture and goodwill of a business—Agreement to sell, handing over possession, crediting price in accounts, made in the account year—Execution and registration of conveyance beyond the account year—No passing of title to immovable property in the account year—Capital gains, not assessable for the relevant assessment year—Movable property—Passing of title by delivery in the account year—Assessable as capital gains—Goodwill—If transferred.

The assessee entered into an agreement on 17th March, 1948, to sell land, building, machinery, furniture and goodwill of a business to another person representing a company in the formation and on the same day put the company in possession of the assets. The agreement was approved by a resolution of the Board of Directors of the company only in 1949. On 20th March, 1948, the assessee had been credited with the prices in the account books of the company. The regular deed of conveyance was however, executed only on 22nd November, 1948. On the question whether the profits of the sale of the assets were assessable as capital gains in the assessment year 1948-49, the Department,

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1. (1950) S.C.R. 548 : (1950) S.C.J. 361 : (1950) 2 M.L.J. 350.

*C.A. No. 5 of 1964. 29th March, 1965.

the Tribunal, and the High Court in Reference held that the same was assessable as capital gains for the year 1948-49. The assessee, by Special Leave, appealed :

Held, the entire sum is not assessable as capital gains in the assessment year 1948-49 but only such part of it as is attributable to the capital gain, if any, made by the transfer of furniture is assessable

Before section 12-B of the Income-tax Act can be attracted title must pass to the vendee by any of the modes mentioned in the section, namely, sale, exchange, or transfer. It is true that the word "transfer" is used in addition to the word "sale" but even so, in the context transfer must mean effective conveyance of the capital asset to the transferee. Delivery of possession of immovable property cannot by itself be treated as equivalent to conveyance of the immovable property. The entries in the account books crediting the amount of sale are irrelevant for the purpose of determining the date of sale or transfer under section 12-B.

Held on facts.: Title to the site and buildings would not pass to the company till a conveyance was executed and registered. Possession of furniture was delivered in the account year and as title to furniture can pass by delivery, capital gains, if any, accrued on that date. Goodwill is an intangible asset and it ordinarily passes along with the transference of the whole business. It cannot be said in the circumstances of this case that the goodwill was transferred in the relevant account year.

Appeal by Special Leave from the Judgment and Order, dated 1st December, 1961, of the Andhra Pradesh High Court in Case Referred No. 21 of 1960.

A.V. Viswanatha Sastri, Senior Advocate (*K. Jayaram* and *R. Vasudeva Pillai*, Advocates with him), for Appellant.

K.N. Rajagopala Sastri, Senior Advocate (*R.N. Sachthey*, Advocate with him), for Respondent.

The Judgment of the Court was delivered by

Sikri, J.—This appeal by Special Leave is directed against the judgment of the High Court of Andhra Pradesh answering the question referred to it under section 66 of the Income-tax Act, 1922, against the appellant. The question referred to was :

"Whether on the facts and in the circumstances of the case a sum of Rs. 79,494 is assessable as capital gains in the assessment year 1948-49?"

The facts relevant to the question are as follows. The assessment year in question is 1948-49 and the accounting year is the official year 1947-48. The appellant, hereinafter referred to as the assessee, Alapati Venkataramiah, was the proprietor of Mohan Tile Works, engaged in the manufacture of tiles and bricks and owned the factory buildings, plant and machinery. The assessee entered into an agreement dated 17th March, 1948, with one Shri Manthena Venkata Raju agreeing to sell to the Mohan Industries Limited, hereinafter called the Company, the aforesaid factory, plant, machinery, furniture, stocks and goodwill for a sum of Rs. 2,00,000. The agreement recited that the assessee had been carrying on business under the name and style of Mohan Tile Works at Tenali and that the company to be called the Mohan Industries Limited is to be formed under the Indian Companies Act, having for its object among other things the acquisition and the working of the said business. It appears that this agreement was drafted before the Company was incorporated and the recital clause was not modified when the agreement was actually executed. It is common ground that the Company was incorporated on 5th July, 1947, before the date of the agreement. Since the answer to the question turns in part on the construction of the agreement it would be convenient to set out the relevant clauses, which are as follows :

"1. The vendor shall sell and the company shall purchase :

First, the goodwill of the said business (with the exclusive right to represent the company as carrying on such business in continuation of the vendor or in succession thereto) ;

Secondly, all the immovable properties specified in Schedule hereto ;

Thirdly, all the plant, machinery, offices, furniture, licences, livestocks, carts, implements and utensils to which the vendor is entitled in connection with the said business specified in the Second Schedule hereto ;

Fourthly, all materials and semi-processed materials in stock described in the third schedule.

2. The consideration for the said sale shall be the sum of Rs. 2,00,000-0-0 which shall be paid and satisfied by payment in cash soon after the capital Rs. 3,00,000-0-0 has been raised or in any other manner agreed upon between the Directors of the Company and vendor.

6. The purchase shall be completed by seventeenth day of March, 1948, at Tenali when possession of the premises shall as far as practicable be given to the company and the consideration aforesaid shall be paid and satisfied subject to the provisions of the agreement and thereupon the vendor and all other necessary parties, if any, shall at the expense of the company execute and do all the assurances and things for vesting the said premises in the company and giving to it the full benefit of this Agreement as shall be reasonably required.

7. If from any cause whatever other than the wilful default of the vendor the purchase shall not be completed by the said 17th day of March, 1948, the company shall pay interest on the said sum of Rs. 2,00,000-0-0 (two lakhs) cash at the rate of........per cent. per annum.

8. Upon the adoption of this agreement by the company in such manner as to render the same binding on the company the said Manthena shall be discharged from all liability in respect thereof.

9. Unless before the day the company shall have become entitled to commence business either of the parties hereto may by notice in writing to the other determine this agreement and after adopting this agreement the company shall stand in the place of the said vendorfor the purpose of this clause.

10. If this agreement shall not be adopted by the company in manner aforesaid before and day next, either of the parties may by notice in writing to the other determine the same."

The assessee was appointed managing agents of the company on 15th July, 1947 and on 11th March, 1948, he wrote a letter on behalf of the company to the Director of Industries and Commerce, Madras, furnishing a detailed list of land, building and machinery comprising the assets of the company together with their value, in connection with the grant of loan by Government. On 20th March, 1948, the assessee was credited with the price of Rs. 2,00,000 in the books of the company. On 22nd November, 1948, sale deed in respect of land was executed in favour of the company. On 9th December, 1948, the company mortgaged the land with all its buildings and structures thereon and the machinery, plant and other property for Rs. 1,00,000 to the State of Madras. On 16th March, 1949, the Board of Directors, by resolution No. 22 approved the agreement dated 17th March, 1948, and on 10th April, 1949, the agreement was approved at the annual general meeting of the company. In the first annual report dated 22nd March, 1949, it was stated as follows :

"The company was registered on 5th July, 1947. The Memorandum of Association and Articles along with the prospectus of the company were published and the shareholders and the public are well aware of the objects and the prospectus of this industry in Andhra. To achieve their objects the directors entered into an agreement called vendor's agreement, with Sri Alapati Venkaramaiah, Proprietor of Mohan Tile Works on 17th March, 1948."

It appears that the assessee had returned this income as capital gains in his return and the Income-tax Officer, without any discussion, held that the assessee realised an excess of Rs. 79,494 over and above the original cost and this was capital gains assessable under section 12-B of the Act.

The assessee appealed to the Appellate Assistant Commissioner and in the grounds of appeal stated that :

"the Income-tax Officer erred in determining the excess over the original cost in respect of the building at Rs. 79,494 as attracting tax to capital gains. As a matter of fact the building was sold at Rs. 1,69,950, but a sum of one lakh alone was received and the balance is yet to be received. The transaction therefore cannot be said to be complete nor can it be said that the profits had been realised. Therefore, the sum of Rs. 79,494 as attracting capital gains is absolutely unjustified."

The Appellate Assistant Commissioner observed that the fact that a part of of the sale amount had not been realised was irrelevant. Then he said that :

"at one stage it was contended that there was no legal transfer of the buildings, machinery etc., to the limited company. There is no substance in this contention also. The limited company is said to have obtained a loan of more than a lakh of rupees from the Madras Government on the basis that they were the owners of the buildings, machinery etc., which they had purchased from the appellant. The statement therefore that there was no legal transfer cannot be true. I am satisfied that the sum of Rs. 79,494 as returned by the appellant under the head capital gains was rightly included in the assessment."

The assessee then appealed to the Appellate Tribunal. The Tribunal, by its order dated 24th November, 1955, held that :

"there was in fact no sale, much less legal transfer of lands, buildings, machinery etc., to the limited liability company which was promoted to take over the tiles business. There was only an agreement to sell. In fact, the assessee did not receive a single pie during the year of account or even

during the period when the capital gains was in force. He received in all Rs. 1 lakh in several instalments beginning from 25th March, 1949, which is beyond the year of account. The point that the assessee himself returned the sum of Rs. 79,494 under the capital gains leads us nowhere. He might have done it under the advice of some income-tax "expert." The assessee cannot be tied down to an inadvisably made wrong statement. In the circumstances, we delete the addition."

It appears that the Commissioner of Income-tax filed an application under section 35 of the Act for the correction of the Tribunal's order on the ground that the Tribunal had not mentioned in the order certain documents which, if they had been considered, would perhaps support a conclusion different from the one arrived at by the Tribunal. The Tribunal thereupon came to the conclusion that its earlier decision deleting the amount from taxation was based on non-consideration of various materials on record and it proceeded to rectify this order as a mistake apparent from the record. Accordingly it deleted Para. 4 in its order dated 24th November, 1955, and substituted its order dated 8th March, 1957. The Tribunal held that in pursuance of clause 6 of the agreement dated 17th March, 1948, the possession of the entire factory was immediately handed over to Mohan Industries and that the sale deed dated 22nd November, 1948, was executed for consideration of Rs. 4,500 only and refers only to the land on which the factory is situated, and did **not** refer to the factory, machinery and plant, etc. which had been taken possession of by Mohan Industries on 17th March, 1948. Further it held that the entries in the account books of Mohan Industries under date 20th March, 1948, showed that a sum of Rs. 2,00,000 was credited in favour of the assessee and the asset accounts were debited as follows:

			Rs.		
"Plant & Machinery a/c	L.P.	27	15,989	0	0
Furniture account	"	29	18,805	0	0
Electric goods	"	31	1,289	10	0
Site & Construction account	"	33	1,26,470	0	0
Stock account	"	34	30,050	0	0
Goodwill account	"	40	7,396	0	0
		Total	2,00,000	0	0

Further it noticed that the assessee also made corresponding entries in the books on 20th March, 1948, by debiting Rs. 2,00,000 to Mohan Industries and crediting the various accounts in the same way. The Tribunal also relied on the letter dated 11th March, 1948, from Mohan Industries to the Director of Industries and the first Annual Report dated 22nd March, 1949. As stated above, the Tribunal referred the question set out above.

The High Court came to the conclusion (1) that in the circumstances of the case it is immaterial as to where the money was actually paid because the transfer had already been made by putting the company in possession, ; (2) that the words used in section 12-B are sale, exchange, relinquishment or transfer. If transfer is equivalent to sale, in that it should only be by a registered instrument, the Legislature would not have used two different words for that purpose. All that is required for the purpose of this section is that the assessee should have a right to receive the profits and not that he should have in fact received it. The assessee, in their view, had a right to receive the two lakhs of rupees under the agreement immediately and in fact he treated it as having been received; (3) the entire movable and immovable property was transferred by giving possession to the company in the year of account and in order to prefect the title the only thing that is required was a registered conveyance in respect of land which was done subsequently ; and (4) that it is apparent from the entire transaction and the method of accounting adopted both by the assessee and the company that the income had arisen to the assessee in the year of account and there is no justification even for the contention that at least immovable assets should be deemed to have been transferred only in the year in

which the actual sale deed was executed. Accordingly, it answered the question in the affirmative.

Mr. A.V. Viswanaths Sastri, the learned Counsel for the assessee, contends that under section 12-B of the Income-tax Act, as it stood at the relevant time, profits and gains are deemed to be the income of the previous year in which the sale, exchange or transfer took place. He says that the sale took place when on 16th March, 1949, the Board of Directors ratified the agreement dated 17th March, 1948; till then there was only an agreement to sell and that an agreement to sell is neither a sale nor a transfer of a capital asset. The relevant part of section 12-B was in the following terms :

> " 12-B. *Capital gains*— (1) The tax shall be payable by an assessee under the head ' capital gains' in respect of any profits or gains arising from the sale, exchange or transfer of a capital asset effected after the 31st day of March, 1946, and before the 1st day of April, 1948 ; and such profits and gains shall be deemed to be income of the previous year in which the sale, exchange or transfer took place........"

The word " capital asset " was defined to mean :

> " property of any kind held by the assessee whether or not connected with his business, profession or vocation but does not include (i) any stock-in-trade., consumable stores or raw materials held for the purpose of his business, profession or vocation....."

The question which arises is whether any sale or transfer took place before the first day of April, 1948. Upto that date, apart from the agreement to sell, three events had taken place. First, the assessee as managing agents had written on 11th March, 1948, *i.e.*, before the agreement was signed to the Government regarding loan. Secondly, on 17th March, 1948, the possession of the land and the buildings and machinery had been given to the company. Thirdly, on 20th March, 1948, the assessee had been credited with the price of Rs. 2,00,000 in the books of the company and he had also made appropriate entries in his own account books.

Turning now to the agreement dated 17th March, 1948, it is urged that this is an agreement to sell and not a sale deed. This is evident from clause I of the agreement. Further it is contended that it is a conditional agreement to sell. Reliance is placed on clauses 8 and 9 of the agreement. Clause 8 expressly contemplates adoption of the agreement by the company in such manner as to render the same binding on the company, and clause 9 contemplates that it is only after the adoption of the agreement that the company shall stand in the place of the said Mantana Venkata Raju. It seems to us that it was a conditional agreement to sell and before it could ripen into a contract between the company and the assessee, it had to be adopted by the company. We may mention that Mr. Rajagopala Sastri urged that we should discard clauses 8 and 9 because they were meant to operate if the agreement had been executed before the incorporation of the company. But we are unable to re-write the agreement. Clauses 8 and 9 are appropriate in an agreement which is made by an agent subject to confirmation by a principal and must be given effect to.

When was the agreement adopted by the company ? We are relieved from addressing ourselves to this question because in the Statement of the Case, which was agreed to by the assessee and the Revenue, it is stated that :

> " the said agreement was approved and accepted by a resolution of the Board of Directors of the Company on 16th March, 1949, and in and by the said resolution the company agreed to pay purchase price in instalments commencing from 31st March, 1949. The agreement was subsequently approved by the general body of shareholders at a meeting held on 10th April, 1949, and on such approval, acceptance and adoption, the agreement became binding on the assessee and the company."

Even if the agreement was accepted by the company in 1949, the question still remains whether any sale or transfer of assets took place before April, 1948. Sale or transfer of an asset could take place, as it did in respect of the site, even before the agreement was accepted. The assets comprised of two items of immovable property, *viz.*, plant and machinery valued at Rs. 15,989 and site and buildings valued at Rs. 1,26,470. It is clear that title to these assets could not pass to the company till the conveyance was executed and registered. (See *Commissioner*

of Income-tax v. *Bhurangya Coal Co*).[1]. No such conveyance was executed before 1st April, 1948. It is only on 22nd November, 1948, that a sale deed was executed and registered in respect of the site. Therefore, it is clear that the title to these assets did not pass to the company till after 1st April, 1948, and consequently no sale took place of these assets before 1st April, 1948.

Mr. Rajagopala Sastri however urges in the alternative that even if no sale took place before 1st April, 1948, the assets had been transferred to the company before that date. He says that "transfer" is a wide word and had been used in section 12-B to cover those cases where rights in assets have been transferred in such a manner as to give rise to capital gains. He further urges that in this case possession of the assets was transferred to the company on 17th March, 1948, and the assessee could never get back possession of the immovable assets in view of section 53-A of the Transfer of Property Act. In none of the cases cited before us has this point been considered. We are unable to sustain this contention. Before section 12-B can be attracted, title must pass to the company by any of the modes mentioned in section 12-B, *i.e.*, sale, exchange or transfer. It is true that the word "transfer" is used in addition to the word "sale" but even so, in the context transfer must mean effective conveyance of the capital asset to the transferee. Delivery of possession of immovable property cannot by itself be treated as equivalent to conveyance of the immovable property.

The High Court has relied on the entries made in the account books of the assessee and the company on 20th March, 1948, but the date of sale or transfer according to section 12-B is the date when the sale or transfer takes place, and it seems to us that the entries in the account books are irrelevant for the purpose of determining such a date.

Mr. Rajagopala Sastri contends that the assessee should not be allowed at this stage to draw a distinction between movable and immovable assets, but in the Statement of the Case, which was agreed to by the assessee and the Revenue, a distinction is drawn thus :

"The building and site was valued at Rs. 1,26,470. The machinery and electrical fittings which were permanently embedded in the earth were respectively valued at Rs. 15,989 and Rs. 1,298-10-0. The stocks were valued at Rs. 30,050 and goodwill at Rs. 7,396-6-0".

We are, therefore, unable to prevent the assessee from relying upon the distinction between movable and immovable assets. In the result, we hold that the following assets were not sold or transferred before 1st April, 1948 :

(i) Machinery valued at Rs. 15,989-0-0.

(ii) Electrical fittings valued at Rs. 1,289-10-0.

(iii) Buildings and site valued at Rs. 1,26,470-0-0.

Therefore, no capital gains in respect of these items arose in the previous year ending 31st March, 1948.

This brings us to the movable assets. Stocks valued at Rs. 30,050 are expressly exempt from the definition of capital asset, and therefore we hold that no capital gain accrued in respect of their sale or transfer. This leaves furniture valued at Rs. 18,805, and goodwill valued at Rs. 7,396-6-0. There is no doubt that possession of furniture was delivered on 17th March, 1948, and as title to furniture can pass by delivery, capital gains, if any, accrued on that date. In the circumstances of the case, delivery must have been made with the intention of passing title. The position regarding goodwill is however different. It is an intangible asset and it ordinarily passes along with the transference of the whole business. It cannot be said in the circumstances of this case that the goodwill was transferred before 1st April, 1948. Accordingly, we hold that only one asset, namely, furniture was transferred before 1st April, 1948. In the result, we answer the question referred to the High Court as follows :

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1. (1958) 34 I.T.R. 802: A.I.R. 1959 S.C. 254.

"In the facts and circumstances of the case the sum of Rs. 79,494 is not assessable as capital gains in the assessment year 1948-49, but only such part of it, if any, as is attributable to the capital gain made by the transfer of furniture valued at Rs. 18,805 is assessable."

The appeal is accordingly accepted and as the assessee has succeeded substantially he will have his costs here and in the High Court.

V.S. *Appeal allowed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLA, RAGHUBAR DAYAL AND J. R. MUDHOLKAR, JJ.

M/s. Kasturi Lal Ralia Ram Jain .. *Appellant* *

v.

The State of Uttar Pradesh .. *Respondent.*

Tort—Negligence—Loss caused to citizen by acts of Public servants—Claim for damages against the Government—Sustainability—Constitution of India (1950), *Article* 300 (1)—*Scope.*

Property seized from the appellant who was arrested on a wrong suspicion that he was carrying stolen property was lost due to the negligence of the Police Officers in not making arrangements for its proper custody as required by the U.P. Police Regulations in that behalf. A Head Constable who was entrusted with the property (gold bars) absconded with it to Pakistan and could not be traced. In a suit by the appellant against the Uttar Pradesh State Government for the value of the property.

Held, the State may sue or be sued in relation to its affairs in cases like those in which a corresponding Province might have sued or been sued if the Constitution had not been enacted. It would be competent to the Parliament or the Legislature of a State to make appropriate provisions in regard to the topic covered by Article 300 (1) of the Constitution. Since no such law has been passed by the State of Uttar Pradesh the question as to whether the Government is liable to be sued for damages at the instance of the appellant has to be determined by reference to the question whether a suit would have been competent against the corresponding Province.

When the State pleads immunity against claims for damages resulting from injury caused by negligent acts of its servants the area of employment referable to sovereign powers must be strictly determined. Before such a plea is upheld the Court must always find that the impugned act was committed in the course of an undertaking or employment which is referable to the exercise of sovereign power or to the exercise of delegated sovereign power.

Though the act which gave rise to the present claim for damages has been committed by the employees of the State Government during the course of its employment, the employment in question being of the category which can claim the special characteristic of sovereign power, the claim cannot be sustained. The remedy to cure this unsatisfactory position in law lies with the Legislature. *State of Rajasthan* v. *Mst. Vidyawati*, (1961) 1 S.C.J. 307 : (1961) 1 M.L.J. (S.C.) 70 : (1961) 1 An.W.R. (S.C.) 70, *explained* and *distinguished.*

It is time that the Legislatures in India seriously consider whether they should not pass legislative enactments to regulate and control their claim for immunity in cases like this on the same lines as has been done in England by the Crown Proceedings Act, 1947.

Appeal from the Judgment and Decree dated the 18th March, 1960 of the Allahabad High Court in First Appeal No. 67 of 1950.

M. S. K. Sastri, Advocate and *M. S. Narasimhan*, Advocate for *P. Keshava Pillai*, Advocate, for Appellant.

A. V. Viswanatha Sastri, Senior Advocate, (*O. P. Rana*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Gajendragadkar, C.J.—The short question of law which arises in this appeal is whether the respondent, the State of Uttar Pradesh, is liable to compensate the appellant, M/s. Kasutri Lal Ralia Ram Jain for the loss caused to it by the negligence of the Police Officers employed by the respondent. This question arises in this way. The appellant is a firm which deals in bullion and other goods at Amritsar. It was duly registered under the Indian Partnership Act. Ralia Ram was one of

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*C.A. No. 105 of 1963. 29th September, 1964.

its partners. On the 20th September, 1947, Ralia Ram arrived at Meerut by the Frontier Mail about midnight. His object in going to Meerut was to sell gold, silver and other goods in the Meerut market. Whilst he was passing through the Chaupla Bazar with this object, he was taken into custody by three Police Constables. His belongings were then searched and he was taken to the Kotwali Police Station. He was detained in the Police lock-up there and his belongings which consisted of gold, weighing 103 tolas 6 mashas and 1 ratti, and silver weighing 2 maunds and 6½ seers were seized from him and kept in Police custody. On the 21st September, 1947, he was released on bail, and some time thereafter the silver seized from him was returned to him. Ralia Ram then made repeated demands for the return of the gold which had been seized from him, and since he could not recover the gold from the Police Officers, he filed the present suit against the respondent in which he claimed a decree that the gold seized from him should either be returned to him, or, in the alternative, its value should be ordered to be paid to him. The alternative claim thus made by him consisted of Rs. 11,075-10-0 as the price of the gold and Rs. 355 as interest by way of damages as well as future interest.

This claim was resisted by the respondent on several grounds. It was urged that the respondent was not liable to return either the gold, or to pay its money value. The respondent alleged that the gold in question had been taken into custody by one Mohammad Amir, who was then the Head Constable, and it has been kept in the Police Malkhana under his charge. Mohd. Amir, however, misappropriated the gold and fled away to Pakistan on the 17th October, 1947. He had also misappropriated some other cash and articles deposited in the Malkhana before he left India. The respondent further alleged that a case under section 409 of the Indian Penal Code as well as section 29 of the Police Act had been registered against Mohd. Amir, but nothing effective could be done in respect of the said case because in spite of the best efforts made by the Police Department, Mohd. Amir could not be apprehended. Alternatively, it was pleaded by the respondent that this was not a case of negligence of the Police Officers, and that even if negligence was held proved against the said Police Officers, the respondent State could not be said to be liable for the loss resulting from such negligence.

On these pleadings, two subtantial questions arose between the parties; one was whether the Police Officers in question were guilty of negligence in the matter of taking care of the gold which had been seized from Ralia Ram, and the second was whether the respondent was liable to compensate the appellant for the loss caused to it, by the negligence of the public servants employed by the respondent. The trial Court found in favour of the appellant on both these issues, and since the gold in question could not be ordered to be returned to the appellant, a decree was passed in its favour for Rs. 11,430-10-0.

The respondent challenged the correctness of this decree by an appeal before the Allahabad High Court and it was urged on its behalf that the trial Court was in error in regard to both the findings recorded by it in favour of the appellant. These pleas have been upheld by the High Court. It has found that no negligence had been established against the Police Officers in question and that even if it was assumed that the Police Officers were negligent and their negligence led to the loss of gold, that would not justify the appellant's claim for a money decree against the respondent. The appellant then moved for and obtained a certificate from the said High Court and it is with the said certificate that it has come to this Court by an appeal. On behalf of the appellant, Mr. M. S. K. Sastri has urged that the High Court was in error in both the findings recorded by it in favour of the respondent. The first finding is one of fact and the second is one of law.

In dealing with the question of negligence, it is necessary to refer to the evidence adduced in this case. The material facts leading to the seizure of gold are not in dispute. The only question which calls for our decision on this part of the case is whether the loss of gold can be legitimately attributed to the negligence of the Police Officers in charge of the Police Station where the gold and silver had been kept in custody. Ganga Prasad is the first witness to whose evidence it is necessary

to refer. He was Class II Officer in Meerut Kotwali at the relevant time. He swears that Mohammad Amir who was in charge of the Malkhana, had fled away to Pakistan without delivering the keys to anyone and without obtaining permission for leaving his post of duty. The Malkhana was accordingly checked and it disclosed that considerable properties kept in the Malkhana were missing. On the 26th October, 1947, Ganga Prasad returned the silver articles to the appellant. Gold was, however, not found in the Malkhana, and so, it could not be returned to it. Ganga Prasad then refers to the investigation carried out against Mohd. Amir for an offence of misappropriation and his evidence shows that Mohd. Amir had absconded, and since the Police Department was unable to apprehend him from Pakistan, the investigation in question became ineffective. According to this witness, the silver and gold of the appellant had not been attached in his presence. He admits that the goods of the appellant remained in the Malkhana of the Kotwali. No list of these goods was forwarded to any officials. This witness further added that valuables are generally kept in the wooden box and the key is kept by the Officer in charge of Malkhana. The gold and silver articles seized from the appellant had not been kept in that box in his presence. He could not explain why the said gold and silver articles were not kept in the Treasury.

The next witness is Mohd. Umar. He was Sub-Inspector II in the Kotwali in September, 1947. He swears to the seizure of the gold and silver articles from Ralia Ram and deposes to the fact that they were not kept in the Malkhana in his presence. Both the arrested persons and the seized articles were left in charge of the Head Constable who had been instructed by Mohd. Umar to keep the goods in the Malkhana. This witness admitted that no list was prepared of the seized goods and he was not able to say whether proper precautions were taken to safeguard the goods in the Malkhana.

The third witness is Agha Badarul Hassan. He was Station Officer of the Police Station in question in September, 1947. He swears that it was a routine requirement that every day in the morning one Sub-Inspector had to inspect the Malkhana under his order. He knew that Ralia Ram had been kept in the lock-up and his articles were kept in the Malkhana, but he added that in his presence these articles were neither weighed nor kept in the Malkhana. He claims to have checked up the contents of the Malkhana, but he conceded that he had made no note about this check in the diary. He purported to say that when he checked the Malkhana, gold and silver were there. He kept the valuables in the Malkhana without any further instructions from the officers, and he was not present when they were kept in the box. This witness claims that valuables are not sent by the Police Officers to the Treasury unless they got orders to that effect. That is the whole of the material evidence bearing on the question of negligence of the Police Officers.

In appreciating the effect of this evidence, it is necessary to refer to some of the relevant provisions in regard to the custody of the goods seized in the course of Police investigation. Section 54 (1) (iv) of the Code of Criminal Procedure provides that any Police Officer may, without an order from a Magistrate and without a warrant, arrest any person in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing. It is under this provision that Ralia Ram was arrested at midnight. It was apprehended by the Police Officers that the gold and silver articles which he was carrying with him might be stolen property, and so, his arrest can be said to be justified under section 54 (1) (iv). Section 550 confers powers on Police Officers to seize property suspected to be stolen. It provides, *inter alia*, that any Police Officer may seize property which may be suspected to have been stolen; and so, gold and silver in the possession of Ralia Ram were seized in exercise of the powers conferred on the Police Officers under section 550 of the Code. After Ralia Ram was arrested and before his articles were seized, he was searched, and such a search is justified by the provisions of section 51 of the Code. Having thus arrested Ralia

Ram and searched his person and seized gold and silver articles from him under the respective provisions of the Code, the Police Officers had to deal with the question of the safe custody of these goods. Section 523 provides for the procedure in that behalf. It lays down, *inter alia*, that the seizure by any Police Officer of property taken under section 51 shall be forthwith reported to a Magistrate, who shall make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession therof, or, if such person cannot be ascertained, respecting the custody and production of such property. These are the relevant provisions of the Code in respect of property seized from a person who has been arrested on suspicion that he was carrying stolen property.

That takes us to the U.P. Police Regulations. Chapter XIV of these Regulations deals with the custody and disposal of property. Regulation 165 provides a detailed procedure for dealing with the disposal of movable property of which the Police takes possession. It is not necessary to refer to these provisions ; it would be enough to state that these provisions indicate that when property is seized by the Police Officers, meticulous care is required to be taken for making a proper list of the property seized, describing it, weighing it, and taking all reasonable steps to ensure its safety. Clause (5) of Regulation 165 provides that when the property consists of gold, silver, jewellery or other valuables, it must be sent in a sealed packet after being weighed, and its weight must be noted in the general diary and on the list which accompanies the packet. It requires that a set of weights and scales should be kept at each Police Station. Regulation 166 is important for our purpose. It reads thus :—

"Unless the Magistrate otherwise directs, property of every description, except cash exceeding Rs. 100 and property of equal value and property pertaining to cases of importance, which will be kept by the Prosecuting Inspector in a separate box under lock and key in the Treasury, will remain in the custody of the Malkhana Moharrir under the general control and responsibility of the Prosecuting Inspector until it has been finally disposed of."

The wording of the Regulation is somewhat complex and confusing, but its purport and meaning are clear. In substance, it provides that property of every description will remain in the custody of the Malkhana Moharrir under the general control and responsibility of the Prosecuting Inspector until it has been finally disposed of. This provision is subject to the instructions to the contrary which the Magistrate may issue. In other words, unless the Magistrate directs otherwise, the normal rule is that the property should remain in the Malkhana. But this rule does not apply to cash exceeding Rs. 100 and property of equal value and property pertaining to cases of importance. Property falling under this category has to be kept by the Prosecuting Inspector in a separate box under lock and key in the Treasury. If the Magistrate issues a direction that property not falling under this category should also be kept in the Treasury, that direction has to be followed and the property in such a case cannot be kept in the custody of the Malkhana Moharrir. It is thus clear that gold and silver which had been seized from Ralia Ram had to be kept in a separate box under lock and key in the Treasury ; and that, admittedly, was not done in the present case. It is in the light of the provisions contained in Regulation 166 that we have to appreciate the oral evidence to which we have already referred. Unfortunately, in dealing with Regulations 165 (5) and 166, the High Court has erroneously assumed that there was no obligation on the Police Officers to deposit Ralia Ram's property in the Treasury. This conclusion is apparently due to the fact that the words used in Regulation 166 are not as clear as they should be and their effect has been misconstrued by the High Court. It is in the light of this position that the oral evidence in the case has to be considered.

Thus considered, there can be no escape from the conclusion that the Police Officers were negligent in dealing with Ralia Ram's property after it was seized from him. Not only was the property not kept in safe custody in the Treasury, but the manner in which it was dealt with at the Malkhana shows gross negligence on the part of the Police Officers. A list of articles seized does not appear to have been made and there is no evidence that they were weighed either. It is true that

the respondent's case is that these goods were misappropriated by Head Constable Mohd. Amir; but that would not assist the respondent in contending that the manner in which the seized property was dealt with at the Police Station did not show gross negligence. Therefore, we are satisfied that the trial Court was right in coming to the conclusion that the loss suffered by the appellant by the fact that the gold seized from Ralia Ram has not been returned to it, is based on the negligence of the Police Officers employed by the respondent; and that raises the question of law which we have set out at the commencement of our judgment.

Mr. M. S. K. Sastri for the appellant has argued that once he is able to establish negligence of the Police Officers, there should be no difficulty in our decreeing the appellant's claim against the respondent, because he urges that in passing a decree against the respondent in the present case, we would merely be extending the principle recognised by this Court in the *State of Rajasthan* v. *Mst. Vidhyawati and another*[1]. In that case, respondent No. 1's husband and father of minor respondent No. 2 had been knocked down by a Government jeep car which was rashly and negligently driven by an employee of the State of Rajasthan. The said car was, at the relevant time, being taken from the repair shop to the Collector's residence and was meant for the Collector's use. A claim was then made by the respondents for damages against the State of Rajasthan and the said claim was allowed by this Court. In upholding the decision of the High Court which had granted the claim this Court observed that the liability of the State for damages in respect of a tortious act committed by its servant within the scope of his employment and functioning as such was the same as that of any other employer. In support of this conclusion this Court observed that the immunity of the Crown in the United Kingdom on which basically the State of Rajasthan resisted the respondent's claim, was based on the old feudalistic notions of justice, namely, that the King was incapable of doing a wrong, and, therefore, of authorising or instigating one, and that he could not be sued in his own Courts. Such a notion, it was said, was inconsistent with the Republican form of Government in our country, particularly because in pursuit of their welfare and socialistic objectives, States in India undertook various industrial and other activities and had to employ a large army of servants. That is why it was observed that there would be no justification, in principle, or in public interest why the State should not be held liable vicariously for the tortious acts of its servants. It is on these observations that Mr. M. S. K. Sastri relies and contends that the said observations as well as the decision itself can be easily extended and applied to the facts in the present case.

It must be conceded that there are certain observations made in the case of *State of Rajasthan*[1] which support Mr. Sastri's argument and make it *prima facie* attractive. But, as we shall presently point out, the facts in the case of the *State of Rajasthan*[1] fall in a category of claims which is distinct and separate from the category in which the facts in the present case fall; and that makes it necessary to examine what the true legal position is in regard to a claim for damages against the respondent for loss caused to a citizen by the tortious acts of the respondent's servants.

This question essentially falls to be considered under Article 300 (1) of the Constitution. This article reads thus :—

> "The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted."

It would be noticed that this article consists of three parts. The first part deals with the question about the form and the cause-title for a suit intended to be filed by or against the Government of India, or the Government of a State. The second

1. (1963) 1 S.C.J. 307 : (1963) 1 M.L.J. Supp. 2 S.C.R. 989.
(S.C.) 70 : (1963) 1 An.W.R. (S.C.) 70 : (1962)

part provides, *inter alia*, that a State may sue or be sued in relation to its affairs in cases like those in which a corresponding Province might have sued or been sued if the Constitution had not been enacted. In other words, when a question arises as to whether a suit can be filed against the Government of a State, the enquiry has to be; could such a suit have been filed against a corresponding Province if the Constitution had not been passed? The third part of the article provides that it would be competent to the Parliament or the Legislature of a State to make appropriate provisions in regard to the topic covered by Article 300 (1). Since no such law has been passed by the respondent in the present case, the question as to whether the respondent is liable to be sued for damages at the instance of the appellant, has to be determined by reference to another question and that is, whether such a suit would have been competent against the corresponding Province.

This last enquiry inevitably takes us to the corresponding preceding provisions in the respective Constitution Acts of India; they are section 65 of the Government of India Act, 1858, section 32 of the Government of India Act, 1915 and section 176 of the Government of India Act, 1935. It is unnecessary to trace the pedigree of this provision beyond section 65 of the Act of 1858, because the relevant decisions bearing on this point to which we will presently refer, are ultimately found to be based on the effect of the provisions contained in the said section. For convenience, let us cite section 65 at this stage:

"The Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the said Company; and the property and effects hereby vested in Her Majesty for the purposes of the Government of India, or acquired for the said purposes, shall be subject and liable to the same judgments and executions as they would while vested in the said Company have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company."

The first decision which is treated as a leading authority on this point was pronounced by the Supreme Court at Calcutta in 1861 in the case of the *Peninsular and Oriental Steam Navigation Company* v. *The Secretary of State for India*[1]. It is a remarkable tribute to the judgment pronounced by Chief Justice Peacock in that case that ever since, the principles enunciated in the judgment have been consistently followed by all judicial decisions in India, and except on one occasion, no dissent has been expressed in respect of them. It seems somewhat ironical that the judgment of this importance should not have been reported in due course in Calcutta, but found a place in the Law Reports in 5 Bom. H.C.R. 1868-69.

Let us then consider what this case decided. It appears that a servant of the plaintiff company was proceeding on a highway in Calcutta driving a carriage which was drawn by a pair of horses belonging to the plaintiff. The accident which gave rise to the action took place on the highway, and it was caused by the negligence of the servants of the Government who had been employed in the Government dockyard at Kidderpore. The said servants were carrying a piece of iron funnel, and the manner in which they were carrying the said funnel caused an injury to one of the horses that were drawing the plaintiff's carriage. It is this injury caused by the negligence of the servants of the Government employed in the Government dockyard that gave rise to the action. The plaintiff company claimed damages against the Secretary of State for India for the damage caused by the said accident. The suit was tried by the Small Cause Court Judge at Calcutta. He found that the defendant's servants were wrongdoers inasmuch as they carried the iron funnel in the centre of the road. According to the learned Judge, the servants were thus liable for the injury caused by their negligence. He was, however, not clear on the question of law as to whether the defendant Secretary of State could be held liable for the tortious act of the Government servants which led to the accident. That is why he referred the said question to the Supreme Court of Calcutta, and the Supreme Court held that the Secretary of State in Council of India would be

1. (1868-69) 5 Bom.H.C.R., Appendix A, p.1.

liable for the damages occasioned by the negligence of servants in the service of Government if the negligence is such as would render an ordinary employer liable.

This question was considered by the Supreme Court in the light of section 65 of the Act of 1858. "The main object of that section," observed Peacock, C.J.,

> "was to transfer to Her Majesty the possession and government of the British territories in India, which were then vested in the East India Company in trust for the Crown, but it does not appear to have been the intention of the Legislature to alter the nature or extent of liabilities with which the revenue of India should be charageable"

The learned Chief Justice then considered the scheme of the other relevant provisions of the said Act and posed the question thus: would the East India Company have been liable in the present action, if the 21st and 22nd Vict., c. 106 had not been passed? Dealing with this question, the learned Chief Justice observed that

> "the origin and progress of the East India Company are too well-known to require any detail for the purpose of the present case. It is sufficient to state that after the passing of the 3rd & 4th Wm. IV, c. 85, they not only exercised powers of Government, but also carried on trade as merchants."

It was then observed by the learned Chief Justice that in determining the question whether the East India Company would, under the circumstances, have been liable to an action, the general principles applicable to Sovereigns and States, and the reasoning deduced from the maxim of the English law that the King can do no wrong, would have no force, because he concurred entirely in the opinion expressed by Chief Justice Grey in the earlier case of *The Bank of Bengal* v. *The East India Company*[1] that the fact of the Company's having been invested with powers usually called sovereign powers did not constitute them Sovereigns. That is one aspect of the matter which was emphasised in that judgment.

Proceeding to deal with the question on this basis, the learned Chief Justice remarked that if the East India Company were allowed, for the purpose of Government, to engage in undertakings, such as the Bullock Train and the conveyance of goods and passengers for hire, it was only reasonable that they should do so, subject to the same liabilities as individuals; and in that view of the matter, the Chief Justice expressed the opinion that for accidents like the one with which the Court was dealing, if caused by the negligence of servants employed by Government, the East India Company would have been liable, both before and after the 3rd and 4th Wm. IV, c. 85, and that the same liability attaches to the Secretary of State in Council, who is liable to be sued for the purpose of obtaining satisfaction out of the revenues of India. "We are of opinion," said the learned Chief Justice, emphatically,

> "that this is a liability not only within the words, but also within the spirit of the 3rd and 4th Wm. IV, c. 85, s. 9 and of the 21st and 22nd Vict., c. 106, s. 65, and that it would be inconsistent with commonsense and justice to hold otherwise."

It then appears to have been urged before the Court in that case that the Secretary of State in Council must be considered as the State or as a public officer employed by the State, and the question of his liability determined on that footing. This argument was rejected on two grounds, that the relevant words of the statute did not justify it, and that "the East India Company were not Sovereigns, and therefore, could not claim all the exemption of a Sovereign." That is how the learned Chief Justice took the view that the case

> "did not fall under the principle of the case with regard to the liabilities of such persons (that is to say, public servants employed by the Sovereign); but they were a company to whom sovereign powers were delegated, and who traded on their own account and for their own benefit, and were engaged in transactions partly for the purposes of Government, and partly on their own account, which, without any delegation of sovereign rights, might be carried on by private individuals."

It is in respect of this aspect of the matter that the Chief Justice enunciated a principle which has been consistently followed in all subsequent decisions. Said the learned Chief Justice,

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1. Bignell Rep. 12.

"there is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them."

Having thus enunciated the basic principle, the Chief Justice stated another proposition as flowing from it. He observed that

"where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by sovereign, or private individual delegated by a sovereign to exercise them, no action will lie.

And, naturally it follows that where an act is done, or a contract is entered into, in the exercise of powers which cannot be called sovereign powers, action will lie. That, in brief, is the decision of the Supreme Court of Calcutta in the case of the *Peninsular and Oriental Steam Navigation Co.*[1]

Thus, it is clear that this case recognises a material distinction between acts committed by the servants employed by the State where such acts are referable to the exercise of sovereign powers delegated to public servants, and acts committed by public servants which are not referable to the delegation of any sovereign powers. If a tortious act is committed by a public servant and it gives rise to a claim for damages, the question to ask is: was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the State to such public servant? If the answer is in the affirmative, the action for damages for loss caused by such tortious act will not lie. On the other hand, if the tortious act has been committed by a public servant in discharge of duties assigned to him not by virtue of the delegation of any sovereign power, an action for damages would lie. The act of the public servant committed by him during the course of his employment is, in this category of cases, an act of a servant who might have been employed by a private individual for the same purpose. This distinction which is clear and precise in law, is sometimes not borne in mind in discussing questions of the State's liability arising from tortious acts committed by public servants. That is why the clarity and precision with which this distinction was emphasised by Chief Justice Peacock as early as 1861 has been recognised as a classic statement on this subject.

We have already indicated that this distinction has been uniformly followed by judicial decisions in India. In that connection, we will refer to a few representative decisions. In the *Secretary of State for India in Council* v. *Moment*[2], the Privy Council had occasion to consider the effect of the provisions of section 41 (*b*) of Act IV of 1898 (Burma), which is similar to the provisions of section 65 of the Government of India Act, 1858. While holding that a suit for damages for wrongful interference with the plaintiff's property in land would have lain against the East India Company, the Privy Council has expressly approved of the principles enunciated by Chief Justice Peacock in the case of *Peninsular and Oriental Steam Navigation Company*[1].

In *Sivabhajan Durgaprasad* v. *Secretary of State for India*[3], this point arose for the decision of the Bombay High Court. In that case a suit had been instituted against the Secretary of State in Council to recover damages on account of the negligence of a Chief Constable with respect to goods seized; and the plaintiff's claim was resisted by the Secretary of State in Council on the ground that no action lay. The High Court upheld the plea raised by the defence on the ground that the Chief Constable seized the goods not in obedience to an order of the Executive Government, but in performance of a statutory power vested in him by the Legislature. The principle on which this decision was based was stated to be that where the duty to be performed is imposed by law and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment. In discussing this point, Jenkins, C. J., referred to the decision in the case of *Peninsular and Oriental Steam Navigation Co.*[1]

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1. (1868-69) 5 Bom. H.C.R. Appendix A, p. 1.
2. (1912-13) L.R. 40 I.A. 48 : 24 M.L.J. 459 : I.L.R. 40 Cal. 391.
3. I.L.R. 28 Bom. 314.

and observed that though he entertained some doubt about its correctness, the said view had stood so long unchallenged that he thought it necessary to accept it as an authority binding on the Court. It is on this solitary occasion that a whisper of dissent was raised by Chief Justice Jenkins, but ultimately, the learned Chief Justice submitted to the authority of the said decision.

In the *Secretary of State for India in Council* v. *A. Cockcraft and another*[1] a claim for damages against the Secretary of State arose in respect of injuries sustained by the plaintiff in a carriage accident which was alleged to have been due to the negligent stacking of gravel on a road which was stated in the plaint to be a military road maintained by the Public Works Department of the Government. The Madras High Court held that the plaintiff had in law no cause of action against the Secretary of State for India in Council in respect of acts done by the East India Company in the exercise of its sovereign powers. This conclusion was based on the finding that the provision and maintenance of roads, especially a military road, is one of the functions of Government carried on in the exercise of its sovereign powers and is not an undertaking which might have been carried on by private persons.

In the *Secretary of State for India in Council* v. *Shreegobinda Chaudhuri*[2], it was held by the Calcutta High Court that a suit for damages does not lie against the Secretary of State for India in Council for misfeasance, wrongs, negligence or omissions of duties of managers appointed by the Court of Wards, because the acts giving rise to the claim were done by officers of Government in the course of exercise of powers which cannot be lawfully exercised save by the sovereign power. It is in this connection that Rankin, C. J., enunciated the principle that no action in tort lies against the Secretary of State for India in Council upon the '*respondeat superior*.' The learned Chief Justice however, recognised that a suit may lie against the Secretary of State for India in Council for torts committed by the Government in connection with a private undertaking or an undertaking not in exercise of soverign power. The same view has been taken by the Allahabad High Court in *Mohammad Murad Ibrahim Khan and another* v. *Government of United Provinces*[3].

In *Uma Prasad* v. *The Secretary of State*[4], certain property which had been stolen from the plaintiff was recovered by the police and was thereafter kept in the Malkhana under orders of the Magistrate during the trial of the thieves. It appears that the receiver, H. A., the man in charge of the Malkhana, absconded with it. That led to a suit by the plaintiff for the recovery of the property, or in the alternative, for its price. The Lahore High Court held that the liability in the case having clearly arisen under the provisions of the Criminal Procedure Code, the defence plea that the act was an act of State could not succeed. Even so, the Court came to the conclusion that the Secretary of State could be held liable only under circumstances in which a private employer can be rendered liable. The Court then examined the question as to whether in circumstances like those which led to the claim for damages in the case before it, a private employer could have been made liable ; and this question was answered in the negative on the ground that no liability attached to the Secretary of State on account of the criminal act of the man in charge of the Malkhana ; the said act was a felonious act unauthorised by his employer. We would like to add that some of the reasons given by the High Court in support of its conclusion may be open to doubt, but, in substance, the decision can be justified on the basis that the act which gave rise to the claim for damages had been done by a public servant who was authorised by a statute to exercise his powers, and the discharge of the said function can be referred to the delegation of the sovereign power of the State, and as such the criminal act which gave rise to the action, could not validly sustain a claim for damages against the State. It will thus be clear that the basic principle enunciated by Peacock, C. J.,

1. (1915) I.L.R. 39 Mad. 351.
2. (1932) I.L.R. 59 Cal. 1289.
3. (1957) I.L.R. 1 All. 94.
4. (1937) I.L.R. 18 Lah. 380.

in 1861 has been consistently followed by judicial decisions in dealing with the question about the State's liability in respect of negligent or tortious acts committed by public servants employed by the State.

Reverting then to the decision of this Court in the case of *State of Rajasthan*[1], it would be recalled that the negligent act which gave rise to the claim for damages against the State of Rajasthan in that case, was committed by the employee of the State of Rajasthan while he was driving the jeep car from the repair shop to the Collector's residence, and the question which arose for decision was : did the negligent act committed by the Government employee during the journey of the jeep car from the workshop to the Collector's residence for the Collector's use give rise to a valid claim for damages against the State of Rajasthan or not ? With respect, we may point out that this aspect of the matter has not been clearly or emphatically brought out in discussing the point of law which was decided by this Court in that case. But when we consider the principal facts on which the claim for damages was based, it is obvious that when the Government employee was driving the jeep car from the workshop to the Collector's residence for the Collector's use, he was employed on a task or an undertaking which cannot be said to be referable to, or ultimately based on, the delegation of sovereign or governmental powers of the State. In dealing with such cases, it must be borne in mind that when the State pleads immunity against claims for damages resulting from injury caused by negligent acts of its servants, the area of employment referable to sovereign powers must be strictly determined. Before such a plea is upheld, the Court must always find that the impugned act was committed in the course of an undertaking or employment which is referable to the exercise of sovereign power, or to the exercise of delegated sovereign power ; and in the case of the *State of Rajasthan*[1], this Court took the view that the negligent act in driving the jeep car from the workshop to the Collector's bungalow for the Collector's use could not claim such a status. In fact, the employment of a driver to drive the jeep car for the use of a civil servant is itself an activity which is not connected in any manner with the sovereign power of the State at all. That is the basis on which the decision must be deemed to have been founded ; and it is this basis which is absent in the case before us.

It is not difficult to realize the significance and importance of making such a distinction particularly at the present time when, in pursuit of their welfare ideal, the Government of the States as well as the Government of India naturally and legitimately enter into many commercial and other undertakings and activities which have no relation with the traditional concept of governmental activities in which the exercise of sovereign power is involved. It is necessary to limit the area of these affairs of the State in relation to the exercise of sovereign power, so that if acts are committed by Government employees in relation to other activities which may be conveniently described as non-governmental or non-sovereign, citizens who have a cause of action for damages should not be precluded from making their claim against the State. That is the basis on which the area of the State immunity against such claims must be limited; and this is exactly what has been done by this Court in its decision in the case of *State of Rajasthan*[1].

In the present case, the act of negligence was committed by the Police Officers while dealing with the property of Ralia Ram which they had seized in exercise of their statutory powers. Now, the power to arrest a person, to search him, and to seize property found with him, are powers conferred on the specified officers by statute and in the last analysis, they are powers which can be properly characterised as sovereign powers ; and so, there is no difficulty in holding that the act which gave rise to the present claim for damages has been committed by the employee of the respondent during the course of its employment ; but the employment in question being of the category which can claim the special characteristic of sovereign-power, the claim cannot be sustained ; and so, we inevitably hark back

1. (1963) 1 S.C.J. 307 : (1963) 1 M.L.J. (S.C.) 70 : (1963) 1 An.W.R. (S.C.) 70 : (1962) Supp. 2 S.C.R. 989.

to what Chief Justice Peacock decided in 1861 and hold that the present claim is not sustainable.

Before we part with this appeal, however, we ought to add that it is time that the Legislatures in India seriously consider whether they should not pass legislative enactments to regulate and control their claim for immunity in cases like this on the same lines as has been done in England by the Crown Proceedings Act, 1947. It will be recalled that this doctrine of immunity is based on the common law principle that the King commits no wrong and that he cannot be guilty of personal negligence or misconduct, and as such cannot be responsible for the negligence or misconduct of his servants. Another aspect of this doctrine was that it was an attribute of sovereignty that a State cannot be sued in its own Courts without its consent. This legal position has been substantially altered by the Crown Proceedings Act, 1947 (10 and 11 Geo. 6, c. 44). As Halsbury points out,

> "Claims against the Crown which might before 1st January, 1948, have been enforced subject to the grant of the royal fiat, by petition of right may be enforced as of right and without a fiat by legal proceedings taken against the Crown[1]."

That is the effect of section 1 of the said Act. Section 2 provides for the liability of the Crown in tort in six classes of cases covered by its clauses (1) to (6). Clause (3), for instance, provides that where any functions are conferred or imposed upon an officer of the Crown as such either by any rule of the common law or by statute and that officer commits a tort while performing or purporting to perform those functions, the liabilities of the Crown in respect of the tort shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the Crown. Section 11 provides for saving in respect of acts done under prerogative and statutory powers. It is unnecessary to refer to the other provisions of this Act. Our only point in mentioning this Act is to indicate that the doctrine of immunity which has been borrowed in India in dealing with the question of the immunity of the State in regard to claims made against it for tortious acts committed by its servants, was really based on the common law principle which prevailed in England ; and that principle has now been substantially modified by the Crown Proceedings Act. In dealing with the present appeal, we have ourselves been disturbed by the thought that a citizen whose property was seized by process of law, has to be told when he seeks a remedy in a Court of law on the ground that his property has not been returned to him, that he can make no claim against the State. That, we think, is not a very satisfactory position in law. The remedy to cure this position, however, lies in the hands of the Legislature.

The result is, the appeal fails, but in the circumstances of this case, we direct that the parties should bear their own costs throughout.

K.S. *Appeal dismissed.*

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1. Halsbury's Laws of England, 3rd Ed., Vol. II, p. 8.

THE SUPREME COURT OF INDIA.

PRESENT :—K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.

Commissioner of Income-tax, Madras .. *Appellant**

v.

The Managing Trustees, Nagore Durgha, Nagore .. *Respondent.*

Income-tax Act (XI of 1922), section 41—Manager or Trustee—Durgha and its properties—Scheme settled by High Court—Administration and management vested in group of persons—Surplus after meeting expenses of Durgha, distributable to descendants of the saint—No beneficial interest in the group of persons—Surplus income—Receipt in the hands of group of persons—Assessable as managers, not as an association of persons.

Under a scheme settled by the High Court, the administration of the affairs of the Durgha was vested in a group of trustees called *Nattamaigars* functioning under an elected managing trustee for a term. The managing trustee, after meeting the expenses of the Durgha, had to distribute the surplus income from the properties to sharers known as *kasupangudars*, who were the descendants of the saint. For the relevant assessment years, the High Court in Reference held that the surplus income in the hands of the managing trustee was to be assessed under section 41 of the Income-tax Act and not as one received by an association of persons. On obtaining a certificate of fitness, the Department appealed.

Held, the assessment should be made on the Managing Trustee to the extent of the interest of each of the sharers in the income received by him, under section 41 of the Act.

All the categories of persons mentioned in the section are deemed to receive the income on behalf of another person or persons or manage the same for his or their benefit. The property may or may not be vested in the persons enumerated under the section. None of them has any beneficial interest in the income ; he collects the income for the benefit of others.

In the instant case the *Nattamaigars* are only managers of the properties in which the Durgha and the *kasupangudars* have beneficial interest. The properties do not vest in them. They receive the income on behalf of both of them. The surplus is held on behalf of the *kasupangudars* distributable according to the shares. Under the scheme also what vests in the *Nattamaigars* is not the property but the administration and management thereof. The income is assessable only under section 41 of the Act.

Appeals from the Judgment and Order dated 4th April, 1961, of the Madras High Court in Case Referred No. 130 of 1956†.

Niren De, Additional Solicitor-General of India (*R. Ganapathy Iyer* and *R. N. Sachthey*, Advocates, with him), for Appellant (In both the Appeals).

A. V. Viswanatha Sastri, Senior Advocate (*M. M. Ismail* and *R. Gopalakrishnan*, Advocates, with him), for Respondent (In both the Appeals).

The Judgment of the Court was delivered by

Subba Rao, J.—In the town of Nagore in Tanjore District, Madras State, there is a Durgha consecrated to Hazerath Sayed Shahul Hameed Quadir Ali Ganja Savoy Andavar, who lived some 400 years ago. The said Durgha receives large income from immovable properties endowed to it and the offerings in cash and kind made by the devotees. The Durgha and its properties are now being administered under a scheme settled by the Madras High Court on 16th March, 1955. Under the scheme the management and the administration of the affairs of the said Durgha vests hereditarily in 8 trustees called *Nattamaigars*, who constitute a board of trustees. The said board of trustees shall from among themselves elect one as a managing trustee and he shall hold office for a term of 3 years. The managing trustee shall at the end of each fasli prepare a balance-sheet verified by the manager and ascertain the net amount available for payment to *kasupangudars*, who are the descendants of Saiyed Muhammed Eusoof, the foster son of the saint. The Managing Trustee shall declare the amount due to each of the *kasupangu* (share) and shall allocate the amount to each *kasupangudar* (sharer) in the list to be prepared for that purpose in each year. He shall pay the amount to each *kasupangudar* in accordance with the list. It is said that at present there are 640 *kasupangudars*. Briefly stated, under the scheme the management of the properties of the Durgha, both movable and immovable, vests in *Nattamaigars*, and the *kasupangudars* are entitled to the surplus in accordance with their shares.

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* Civil Appeals Nos. 213 and 214 of 1964. 8th April, 1965.

† 44 I.T.R. 341.

For the assessment years 1953-54 and 1954-55 the Income-tax Officer assessed the surplus income in the hands of the Managing Trustee as an association of persons. The Appellate Assistant Commissioner, on appeal, confirmed the same. On further appeal, the Income-tax Appellate Tribunal took the same view. At the instance of the assessee, the Tribunal submitted the following question for the opinion of the High Court of Madras under section 66 (1) of the Income-tax Act, 1922, hereinafter called the Act :

" Whether the provisions of section 41 can be said to apply to the assessees in this case."

A Division Bench of the High Court, which heard the Reference, held that the Managing Trustee *qua* the surplus income managed the property and derived the income on behalf of the *kasupangudars* and that the assessment should be made on the said Managing Trustee to the extent of the interest of each of the *kasupangudars* in the income received by him. In the result it answered the question in the affirmative and in favour of the assessee. The Commissioner of Income-tax, Madras, on a certificate of fitness granted by the High Court, has preferred the present appeals against the said Order.

The learned Additional Solicitor-General, appearing for the Revenue, contended that the *Nattamaigars* being trustees, the properties of the Durgha vested in them and, therefore, they or the Managing Trustee administered the trust properties in their own right and not on behalf of the *kasupangudars* and hence section 41 of the Act did not apply, with the result the Income-tax Officer had rightly assessed the surplus income in the hands of the trustees as an association of persons.

Mr. A. V. Viswanatha Sastri, learned Counsel for the assessee-respondent, argued, on the other hand, that the *Nattamaigars* of the Durgha were not trustees as understood in the law of trust but were only managers managing the properties on behalf of the Durgha and *kasupangudars*. On that assumption, his argument proceeded, as the *Nattamaigars*, as managers, held the surplus on behalf of the *kasupangudars* for distribution in definite shares, section 41 of the Act was attracted.

At the outset we may make it clear that in this appeal we are concerned only with the surplus remaining on hand with the *Nattamaigars* after meeting the expenses of the Durgha.

The problem presented in these appeals falls to be decided on a true construction of section 41 of the Act. The material part of section 41 reads :

"(1) In the case of income, profits or gains chargeable under this Act which the Courts of Wards, the Administrators-General, the Official Trustees or any receiver or manager (including any person whatever his designation who in fact manages property on behalf of another) appointed by or under any order of a Court, or any trustee or trustees appointed under a trust declared by a duly executed instrument in writing whether testamentary or otherwise (including the trustee or trustees under any Wakf deed which is valid under the Mussalman Wakf Validating Act, 1913), are entitled to receive on behalf of any person, the tax shall be levied upon and recoverable from such Court of Wards, Administrator-General, Official Trustee, receiver or manager or trustee or trustees, in the like manner and to the same amount as it would be leviable upon and recoverable from the person on whose behalf such income, profits or gains are receivable, and all the provisions of this Act shall apply accordingly."

Under this section the income of properties receivable by the enumerated persons for the benefit of others is liable to be assessed to tax in their hands in the like manner and to the same amount as it would be leviable upon and recoverable from the person or persons on whose behalf such income is receivable. This section centres on the basic fact that the person in whose hands the income is assessable shall be entitled to receive the same on behalf of any person ; if he is not so entitled, the provisions of the section cannot be invoked. So, it is contended that, as the properties vested in the managing trustee and he received the income in his own right and not on behalf of the beneficiaries, though for their benefit, the said income in the hands of the managing trustee fell outside the scope of section 41 of the Act.

There are two answers to this contention. The doctrine of vesting is not germane to this contention. In some of the enumerated persons in the section the property vests and in others it does not vest, but they only manage the property. In general law the property does not vest in a receiver or manager but it vests in a

trustee, but both trustees and receivers are included in section 41 of the Act. The common thread that passes through all of them is that they function legally or factually for others : they manage the property for the benefit of others. That the technical doctrine of vesting is not imported in the section is apparent from the fact that a trustee appointed under a trust deed is brought under the section though legally the property vests in him. In the case of a Muslim Wakf the property vests in the Almighty ; even so the mutawallies are brought under the section. A reasonable interpretation of the section is that all the categories of persons mentioned therein are deemed to receive the income on behalf of another person or persons or manage the same for his or their benefit. None of them has any beneficial interest in the income ; he collects the income for the benefit of others. In this view, even if the *Nattamaigars* were trustees in whom the properties of the Durgha vested, they should be deemed to have received the income only on behalf of the *kasupangudars* in definite shares.

The same conclusion will be reached even if the problem was approached from a different angle. In the well-known decision of the Privy Council in *Vidya Varuthi Thirtha* v. *Balusami Ayyar*[1], the inappropriateness of the use of the expression "trustee" to the manager of a Hindu or Mahommedan religious endowments was brought out. Therein their Lordships observed :

> " Neither under the Hindu Law nor in the Mahommedan system is any property ' conveyed ' to a shebait or a mutawalli, in the case of a dedication. Nor is any property vested in him ; whatever property he holds for the idol or the institution he holds as manager with certain beneficial interests regulated by custom and usage. Under the Mahommedan Law, the moment a wakf is created all rights of property pass out of the wakf, and vest in God Almighty. The curator, whether called mutawalli or *sajjadanishin*, or by any other name, is merely a manager. He is certainly not a ' trustee ' as understood in the English system."

The Privy Council, in the context of a wakf property, reaffirmed the said observations, in *Allah Rakhi* v. *Mohammad Abdur Rahim*[2]. The effect of the said decisions is that *Nattamaigars* are only the managers of the properties in which the Durgha and the *kasupangudars* have beneficial interests. The properties do not vest in them. They receive the income therefrom on behalf of both of them. After meeting the expenses of the Durgha they hold the balance on behalf of the *kasupangudars* and distribute the same in accordance with their shares. In this view, in terms of section 41 of the Act the *Nattamaigars* are the managers of the properties on behalf of others and are entitled to receive the income therefrom on behalf of them. With the result, the income which they hold on behalf of the *kasupangudars* can be assessed only in their hands in the manner prescribed thereunder. But it is said that whatever may be the doctrine of Hindu or Mohammadan law, under the terms of the aforesaid scheme the properties vested in the *Nattamaigars* and, therefore, they receive the income in their own right and not on behalf of the *kasupangudars*. A careful reading of the relevant part of the scheme does not countenance this argument. Clause 3 of the scheme, which is the material clause, reads :

> " The management and administration of the affairs of the Nagore Durgha at Nagore, Tanjore District, and other thaklas and shrines connected therewith (mentioned in Schedule-A hereunder) and all properties—movables and immovables—which belong to or have been or may hereafter be given, dedicated, endowed thereto, shall subject to the provisions thereof vest hereditarily in the eight trustees or *Nattamaigars* of the Durgha who shall constitute the Board of Trustees. Each trustee or *Nattamaigar* is entitled to hold office for life, and after him the trusteeship shall devolve on his next male heir in accordance with the custom prevailing in respect of such office in the Durgha."

Under this clause the management and administration of the Nagore Durgha and its properties vest in the *Nattamaigars*. What vests in the *Nattamaigars* is not the properties of the Durgha but the management and administration thereof. Unless the words are clear we are not prepared to hold that the High Court in framing a scheme for the endowments of the Durgha had introduced a foreign concept of " trust " in derogation of Mohammadan Law. We, therefore, hold that the scheme did not vest the properties of the Durgha in the *Nattamaigars*.

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1. (1921) 41 M.L.J. 346 : L.R. 48 I.A. 302, 315 : I.L.R. 44 Mad. 831.
2. (1933) 66 M.L.J. 431 : L.R. 61 I.A. 50.

Lastly, a faint argument was raised to the effect that under the scheme the managing trustee was not appointed under any order of a Court but was appointed by an agreement among the trustees. But in clause 4 of the scheme the High Court gave a specific direction that the managing trustee shall be elected from among the Board of Trustees. The Managing Trustee elected was certainly appointed under an order of a Court, for the election was held pursuant to the order of the Court. That apart, in the view we have taken, namely, that the *Nattamaigars* are not trustees in the English sense of the term, this question does not arise for consideration.

In the result, we hold that the High Court has rightly answered the question referred to it in the affirmative and in favour of the assessee. The appeals fail and are dismissed with costs. One hearing fee.

V.S. *Appeals dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, J. C. SHAH AND R. S. BACHAWAT, JJ.

Dr. G. H. Grant (In all the Appeals) .. *Appellant**

v.

The State of Bihar (In all the Appeals) .. *Respondent.*

Land Acquisition Act (*I of* 1894), *section* 30—*Land Acquisition Officer—If can refer question of apportionment under section* 30 *to decision of the Court after making the award under section* 12 *fixing the compensation and apportioning the same among the persons interested in the land.*

By majority (with *Subba Rao, J.* dissenting).—The Land Acquisition Officer can after making the award and filing it under section 12 of the Land Acquisition Act, 1894, fixing the compensation for the land acquired and apportioning the same among the persons interested in the land, refer the question of apportionment under section 30 of the Act to the decision of the Court. The powers exercisable by the Collector under section 18 (1) and section 30 are distinct and may be invoked in contingencies which do not overlap. Exercise of the power under section 30 to refer the dispute relating to apportionment or as to the persons to whom it is payable is discretionary. The Collector may but is not bound to exercise that power. It is however not predicated of the exercise of that power that the Collector has not apportioned the compensation money by his award. It cannot be said that the power under section 30 has to be exercised on a motion within the period prescribed by section 18 (2) of the Land Acquisition Act. There is nothing in the Land Acquisition Act which prohibits the Collector from making a reference under section 30 for determination of the title of the person who has since the date of the award acquired a right to the compensation. The award is conclusive only between the Collector and the persons interested and not among the persons interested.

Appeals from the Judgments and Decrees dated 5th January, and 22nd January, 1959, and 24th November, 1960 of the Patna High Court in Appeals from Original Decrees Nos. 401 of 1953, and 297 and 298 of 1954 respectively.

S. R. Ghosal and *R. C. Prasad*, Advocates, for Appellant (In all the Appeals).

D. P. Singh, *R. K. Garg*, *S. C. Agarwala* and *M. K. Ramamurthi*, Advocates of *M/s. Ramamurthi & Co.*, for Respondent (In all the Appeals).

The Court delivered the following Judgments:

Subba Rao, J.—I regret my inability to agree with brother Shah, J., on one of the questions raised in the appeals, namely, whether the Land Acquisition Officer can, after making the award under section 12 of the Land Acquisition Act, 1894, hereinafter called the Act, fixing the compensation for the land acquired and apportioning the same among the persons interested in the land, refer the question of apportionment under section 30 of the Act to the decision of the Court. Shah, J., held he could ; but, with great respect to him, I take a different view.

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*C.As. Nos. 262 to 264 of 1964. 30th March, 1964.

The facts are fully stated in the judgment of Shah, J., and they need not, therefore, be restated here.

The answer to the problem raised falls to be decided on a conspectus of the relevant provisions of the Act. Section 9 of the Act enjoins on the Collector to cause public notice to be given at convenient places on or near the land to be taken, stating that the Government intends to take possession of the land, and that claims to compensation for all interests in such land may be made to him ; under sub-section (2) thereof such notice shall state the particulars of the land so needed and shall require persons interested in the land to appear personally or by agent before the Collector at a time and place therein mentioned and to state the nature of their respective interests in the land and the amount and particulars of their claims to compensation for such interests, and their objections, if any, to the measurements made under section 8. Under section 11, on the day fixed or on any other day to which the enquiry has been adjourned, the Collector shall proceed to make an enquiry and shall make an award under his hand of (i) the true area of the land ; (ii) the compensation which in his opinion should be allowed for the land ; and (iii) the apportionment of the said compensation among all the persons known or believed to be interested in the land, of whom, or of whose claims, he had information, whether or not they have respectively appeared before him. Under section 12,

"such award shall be filed in the Collector's Office and shall, except as hereinafter provided, be final and conclusive evidence, as between the Collector and the persons interested, whether they have respectively appeared before the Collector or not, of the true area and value of the land, and the apportionment of the compensation among the persons interested."

The group of sections, *viz*., sections 9 to 15, describes the subject-matter and the nature of the enquiry to be held by the Collector and provides for the making of the final award in respect of the said subject-matter ; sections 18 to 28 provide for reference to Court and the procedure to be followed therein in respect thereof. Sections 29 and 30 fall under Part IV of the Act under the heading " Apportionment of Compensation ". As the decision mainly turns upon these provisions, it will be convenient to read them in full

Section 29. *Particulars of apportionment to be specified*.—Where there are several persons interested, if such persons agree in the apportionment of the compensation, the particulars of such apportionment shall be specified in the award, and as between such persons the award shall be conclusive evidence of the correctness of the apportionment.

Section 30. *Disputes as to apportionment*.—When the amount of compensation has been settled under section 11, if any dispute arises as to the apportionment of the same or any part thereof, or as to the persons to whom the same or any part thereof is payable, the Collector may refer such dispute to the decision of the Court.

While section 11 imposes a statutory duty on the Collector to enquire in respect of the three matters mentioned therein, sections 29 and 30 deal with the manner of deciding the dispute in respect of one of the said matters, *viz*., apportionment of the compensation fixed ; under section 29, if the claimants agree in the apportionment of the compensation, the agreed particulars shall be specified in the award and the said award is final as between them. It is manifest that this agreement necessarily refers to the apportionmemt to be made under section 11 before the award is made, for the section in terms says that the agreed particulars shall be entered in the award. If there is no such agreement, section 30 comes into play. It also refers to a stage after the compensation has been settled and before the apportionment is made and included in the award. If there was no agreed formula, the Land Acquisition Officer has the discretion, presumably when there is a complicated question, to refer the dispute in respect of the apportionment to the Court. But he need not do so if he thinks fit to decide the dispute for himself.

The Land Acquisition Act discloses a well-knit scheme in the matter of making an award. The Land Acquisition Officer, after issuing notice calling for objections, decides on the three matters prescribed in section 11, *i.e.*, the true area of the land, the amount of compensation and the apportionment of the compensation. Before making the apportionment of the compensation he can resort to any of the following three methods : (i) to accept an agreed formula ; (ii) to decide for himself;

and (iii) to refer to the Court if he thinks that the decision of the Court is necessary. But once the award is made, it becomes final and it can be reopened only in the manner prescribed, *i.e*, by way of a reference under section 18 of the Act. This construction makes for the smooth working of the provisions of the Act and does not lead to any anomalies. It also does not affect the right of the aggrieved parties to proceed in the manner prescribed by the Act for getting the award vacated or modified, as the case may be. It is said that if this view be accepted, a person who acquires a right after the award by transfer *inter vivos* or by devolution of interest will be without a remedy. I do not see any difficulty in that regard. Under section 18 he may ask for a reference. He may apply to be brought on record after the reference is made to the Court. It may also be that he may proceed in a civil Court to recover the compensation from the persons who received it on the basis of his title. On the other hand, the contrary view will lead to an incongruous position. It enables the Land Acquisition Officer to reopen a final award in the teeth of the express provisions of section 12 of the Act. It further enables him to make a reference without any period of limitation and thus to disturb the rights finally settled by the award. I, therefore, hold that the Land Acquisition Officer cannot make a reference under section 30 of the Act in the matter of apportionment of compensation after the award has been made by him apportioning the compensation under section 11 and has been filed under section 12 thereof.

During the course of the arguments it was suggested that as the interest of Dr. Grant devolved on the Government it may be held that the Government was in substance brought on record in the place of Dr. Grant in the reference made under section 18 of the Act to the District Court. But the point was not raised at any stage of the proceedings. Indeed no application was filed in the District Court for bringing the Government on record in the place of Dr. Grant. In the circumstances I am not justified in permitting the respondent to raise the said point for the first time before this Court.

In the result, I set aside the decision of the High Court and restore that of the District Court. The appellant will have his costs throughout.

Shah, J. (for himself and *Bachawat, J.*)—Dr. Gregor Hugh Grant—hereinafter called 'Dr. Grant'—was the proprietor of the Dumka Estate in the District of Santhal Parganas in the State of Bihar. By a notification under section 4 (1) of the Land Acquisition Act, 1894, published on 8th June, 1949 the Government of of Bihar notified for acquisition a large area of land out of the estate of Dr. Grant for establishing "an agricultural farm". The Collector made on 25th March, 1952 awards setting out the true area of the land notified for acquisition, compensation which in his opinion should be allowed for the land and apportionment of the compensation among all the persons known or believed to be interested in the land. The awards were filed in the Collector's Office on the same day. In respect of Plot No. 142, Rs. 575-14-0, were awarded by the Collector as compensation in equal shares to Dr. Grant and the members of the village community, who had also made a claim for compensation. In respect of Plot No. 68, the Collector awarded Rs. 294-6-0 as compensation. In respect of acquisition of an area admeasuring 88.91 acres consisting of several plots, the Collector awarded Rs. 1,64,446-5-10 as compensation and directed apportionment in the manner set out in the award.

On 5th May, 1952, Dr. Grant applied to the Collector under section 18 of the Land Acquisition Act that the three matters be referred for determination by the Court of the amount of compensation payable to the owners. Similar applications were filed in respect of Plots Nos.68 and 142 by the members of the village community In consequence of a notification issued under section 3 of the Bihar Land Reforms Act XXX of 1950 the Dumka Estate vested on 22nd May, 1952 in the State of Bihar. In exercise of the power under section 16 of the Land Acquisition Act, the Government of Bihar took over possession on 21st August, 1952 of the lands notified for acquisition. On 15th October, 1952, the Government Pleader submitted a petition before the Collector claiming that the compensation money awarded to Dr. Grant had since the publication of the notification under the Bihar Land Reforms Act

become payable to the State Government, and the dispute between Dr. Grant and the State Government regarding the right to payment may be referred to the Court under section 30 of the Land Acquisition Act.

The Collector made on 5th November, 1952 three references to the District Court, Santhal Parganas. Two out of those references were made in exercise of powers under sections 30 and 18 of the Land Acquisition Act, and the third under section 30. The District Judge by his order dated 9th April, 1954 held that the State of Bihar had no interest in the property notified for acquisition when the award was filed before the Collector under section 12 of the Land Acquisition Act, and the State could lay no claim to the compensation money awarded. The District Judge upheld the apportionment of compensation between Dr. Grant and the village community and enhanced the valuation of the land and directed that compensation at the enhanced rate be awarded.

Against the order of the District Judge in the references, three appeals Nos. 401 of 1953, 297 of 1954 and 298 of 1954 were preferred by the State to the High Court of Judicature at Patna. The High Court held that title of the owner to the land acquired under the Land Acquisition Act could not be extinguished under the Act till possession was taken under section 16 of the Act, and that since the title of Dr. Grant in the land acquired stood statutorily vested in the State by virtue of the notification issued under the Bihar Land Reforms Act, he was not entitled to receive the compensation money. In the view of the High Court, title to the compensation money had vested in the State Government before possession was obtained by the State Government under section 16 of the Land Acquisition Act, and that it was open to the Collector, on a dispute raised by the State about the right to receive the compensation money, to make a reference to the Court under section 30 of the Act. With certificate granted by the High Court, these three appeals have been preferred by Dr. Grant.

Three contentions have been urged in support of the appeals : (1) the Collector had no authority to refer the matter under section 30 after he had apportioned the amount of compensation under section 11, (2) since title to compensation is derived solely from and on the date of the award, the notification under section 3 of the Bihar Land Reforms Act did not deprive Dr. Grant of his right to receive compensation, and (3) the State Government was not "a person interested" within the meaning of the Land Acquisition Act, and could not apply for a reference under section 30.

After a notification is issued under section 6 of the Land Acquisition Act, the appropriate Government may acquire the land notified in the manner set out in sections 7 to 16. Section 9 provides for an enquiry into the area of the land, into compensation which is payable and apportionment of compensation. The Collector is by section 11 authorised to make an award setting out the true area of the land, the compensation which, in his opinion, should be allowed for the land and the apportionment of the said compensation among all the persons known or believed to be interested in the land, or of whose claims, he has information, whether or not they have respectively appeared before him. The award when filed in the Collector's Office becomes final and conclusive evidence as between the Collector and the persons interested whether they have respectively appeared before the Collector or not, of the true area and value of the land and the apportionment of compensation among the persons interested. The land vests absolutely in the Government, free from all encumbrances when possession is taken by the Collector under section 16. By section 17 authority is conferred upon the Collector, when in cases of urgency the appropriate Government so directs, to take possession of waste or arable land even before making an award. Section 48 authorises the Government to withdraw from the acquisition any land of which possession has not been taken. By section 18 the Collector is enjoined to refer to the District Court for determination, objections as to the measurement of the land, the amount of compensation, the persons to whom it is payable, or the apportionment thereof among the persons interested. Part IV

deals with apportionment of compensation. If the persons interested agree in the apportionment of the compensation, the particulars of such apportionment shall be specified in the award (section 29) : if there be no such agreement, the Collector may, if a dispute arises as to the apportionment of the compensation or any part thereof or as to the persons to whom the same or any part thereof is payable, refer such dispute under section 30 for decision by the Court. Part V of the Act which contains sections 31 to 34 deals with payment of compensation. Under section 31 the Collector has to tender payment of the compensation awarded by him to the persons interested entitled thereto according to the award. By the third proviso to sub-section (2) of section 31, liability of any person, who may receive the whole or any part of the compensation awarded under the Act, to pay the same to the person lawfully entitled thereto, is not affected. Sections 32 and 33 deal with investment of money deposited in respect of land belonging to persons incompetent to alienate the land and in other cases, but with these we are not concerned. Section 34 obliges the Collector to pay interest at the rate of six per centum per annum if compensation is not paid or deposited on or before taking possession of the land from the time of taking possession until it is so paid or deposited.

There are two provisions, section 18 (1) and 30 which invest the Collector with power to refer to the Court a dispute as to apportionment of compensation or as to the persons to whom it is payable. By sub-section (1) of section 18 the Collector is enjoined to refer a dispute as to apportionment, or as to title to receive compensation, on the application within the time prescribed by sub-section (2) of that section of a person interested who has not accepted the award. Section 30 authorises the Collector to refer to the Court after compensation is settled under section 11, any dispute arising as to apportionment of the same or any part thereof or as to the persons to whom the same or any part thereof is payable. A person shown in that part of the award which relates to apportionment of compensation, who is present either personally or through a representative, or on whom a notice is served under sub-section (2) of section 12, must, if he does not accept the award, apply to the Collector within the time prescribed under section 18 (2) to refer the matter to the Court. But a person who has not appeared in the acquisition proceeding before the Collector may, if he is not served with notice of the filing, raise a dispute as to apportionment or as to the persons to whom it is payable, and apply to the Court for a reference under section 30, for determination of his right to compensation which may have existed before the award, or which may have devolved upon him since the award. Whereas under section 18 an application made to the Collector must be made within the period prescribed by sub-section (2), clause (*b*), there is no such period prescribed under section 30. Again under section 18 the Collector is bound to make a reference on a petition filed by a person interested. The Collector is under section 30 not enjoined to make a reference; he may relegate the person raising a dispute as to apportionment, or as to the person to whom compensation is payable, to agitate the dispute in a suit and pay the compensation in the manner declared by his award.

We are unable to agree with the view expressed by the Mysore High Court in *Borugowda and another* v. *Subbaramiah and others*[1] that if the Collector has made apportionment of the compensation money by his award his power to refer a dispute under section 30 cannot be exercised. Clause (iii) of section 11 enjoins the Collector to apportion the compensation money among person known or believed to be interested in the land ; he has no discretion in the matter. Exercise of the power under section 30 to refer the dispute relating to apportionment or as to the persons to whom it is payable is, it is true, discretionary ; the Collector may, but is not bound to exercise that power. It is however not predicated of the exercise of that power that the Collector has not apportioned the compensation money by his award. We are also unable to agree with the Mysore High Court that the power under section 30 of the Land Acquisition Act has to be exercised on a motion

1. A.I.R. 1959 Mys. 265.

within the period prescribed by section 18 (2) of the Land Acquisition Act. In our judgment the powers exercisable by the Collector under section 18 (1) and under section 30 are distinct and may be invoked in contingencies which do not overlap.

By virtue of the notification issued under the Bihar Land Reforms Act the right of Dr. Grant vested in the State of Bihar. On 25th March, 1952, when the Collector made an award under section 11, the only persons interested in the award were Dr. Grant and the members of the village community, but the title of Dr. Grant in the land notified for acquisition stood, by operation of the Bihar Land Reforms Act, transferred as from 22nd May, 1952 to the State of Bihar. A dispute then arose between the State Government and Dr. Grant "as to the persons to whom" compensation was payable. The State had no right to the compensation payable for the land under a title existing before the date of the award of the Collector, and no application for reference could be made by the State, as a person interested within the meaning of section 18 (1). The title of the State to receive compensation arose only when in consequence of the notification under section 3 of the Bihar Land Reforms Act, the title of Dr. Grant to the Estate was divested.

An award by the Collector is strictly speaking an offer made to the person interested in the land notified for acquisition : the latter may accept the offer, but is not bound to accept it. He may ask for a reference to the Court for adjudication of his claim for adequate compensation. The person interested may even accept the compensation under protest as to the sufficiency of the amount and ask for a reference. It is also open to the Government, even after the award is made, but before possession is taken, to withdraw from acquisition of any land in exercise of the powers conferred by section 48 of the Land Acquisition Act. It is therefore not the award of the Collector which is the source of the right to compensation ; the award quantifies the offer of the appropriate Government, which is made because the Government has taken over, or intends to take the land of the owner under the authority conferred by the Land Acquisition Act. In *Sarju Prasad Saha* v. *The State of Uttar Pradesh and others*[1] it was observed by this Court in considering the scheme of the Act that the right of the owner of the land is extinguished when Government takes possession of the land after an award of compensation is made. This is also supported by the scheme of the Act. Interest is made payable under section 28 on the additional amount of compensation awarded by the Court from the date on which the Collector had taken possession. Similarly under section 34 interest is made payable on the compensation from the date on which the possession is taken, if the same be not paid or deposited on or before taking possession of the land.

The right of the State of Bihar arose on 22nd May, 1952, when the title to the land vested in it by virtue of the notification issued under the Bihar Land Reforms Act. There is nothing in the Land Acquisition Act which prohibits the Collector from making a reference under section 30 for determination of the title of the person who has since the date of the award acquired a right to the compensation. If after a reference is made to the Court, the person interested dies or his title devolves upon another person, because of inheritance, succession, insolvency, forfeiture, compulsory winding up or other form of statutory transfer, it would be open to the party upon whom the title has devolved to prosecute the claim which the person from whom the title has devolved could have prosecuted. In *Promotha Nath Mitra* v. *Rakhal Das Addy*[2] it was held that a reference made by the Collector under section 30 of the Land Acquisition Act at the instance of a proprietor of land may be prosecuted by the purchaser of his rights after the award at a revenue auction. If the right to prosecute a reference by a person on whom the title of the person interested has devolved be granted, there is no reason why the right to claim a reference of a dispute about the person entitled to compensation may not be exercised by the person on whom the title has devolved since the date of the award.

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1. Reported infra in (1965) 2 S.C.J. 411. 2. 11 Cal. L.J. 420.

The scheme of the Land Acquisition Act is that all disputes about the quantum of compensation must be decided by resort to the procedure prescribed by the Act; it is also intended that disputes about the rights of owners to compensation being ancillary to the principal dispute should be decided by the Court to which power is entrusted. Jurisdiction of the Court in this behalf is not restricted to cases of apportionment, but extends to adjudication of disputes as to the persons who are entitled to receive compensation, and there is nothing in section 30 which excludes a reference to the Court of a dispute raised by a person on whom the title of the owner of land has, since the award, devolved.

It was strongly pressed that under section 31 of the Land Acquisition Act the Collector is bound to tender payment of compensation awarded by him to the persons entitled thereto according to the award and that implied that a right in the amount of compensation arises to the person to whom compensation is directed to be paid under the award, and therefore the only persons who can raise a dispute under section 30 are those whose names are set out in the award. This contention stands refuted by the plain terms of section 30. The Collector is not authorised to decide finally the conflicting rights of the persons interested in the amount of compensation: he is primarily concerned with the acquisition of the land. In determining the amount of compensation which may be offered, he has, it is true, to apportion the amount of compensation between the persons known or believed to be interested in the land, of whom, or of whose claims, he has information, whether or not they have appeared before him. But the scheme of apportionment by the Collector does not finally determine the rights of the person interested in the amount of compensation: the award is only conclusive between the Collector and the persons interested and not among the persons interested. The Collector has no power to finally adjudicate upon the title to compensation: that dispute has to be decided either in a reference under section 18 or under section 30 or in a separate suit. Payment of compensation therefore under section 31 to the person declared by the award to be entitled thereto discharges the State of its liability to pay compensation (subject to any modification by the Court), leaving it open to the claimant to compensation to agitate his right in a reference under section 30 or by a separate suit.

The dispute between the State of Bihar and Dr. Grant has been expressly referred by the Collector to the Court for decision. Under the Bihar Land Reforms Act, the title of Dr. Grant to the land notified for acquisition became vested in the State, and therefore the right to compensation for the land acquired devolved upon the State. A dispute between Dr. Grant and the State as to their conflicting claims to the compensation money was clearly a dispute which could be referred under section 30 of the Land Acquisition Act to the Court and was in fact referred to the Court. We are unable to agree with Counsel for Dr. Grant that the reference made by the Collector under section 30 was incompetent, because the State was not interested in the compensation money on the date when the award was made. The right of the State of Bihar has undoubtedly arisen after the award was made, but once the title which was originally vested in Dr. Grant stood statutorily transferred to the State, it was open to the State to claim a reference, not because the State was a person interested in the compensation money before the date of the award, but because of the right which has arisen since the award was made.

We therefore dismiss the appeals with costs. There will be one hearing fee.

ORDER OF THE COURT.—Following the judgment of the majority, the appeals are dismissed with costs. There will be one hearing fee.

K.S. *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

PRESENT :—K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.

Commissioner of Income-tax, Andhra Pradesh, Hyderabad .. *Appellant**

v.

Cocanada Radhaswami Bank, Ltd., Kakinada .. *Respondent.*

Income-tax Act (XI of 1922), sections 6, 8, 10, 24 (2)—Loss—Carry forward—Banking business—Government securities forming part of trading assets—Business loss—Whether could be set off against income from securities.

The assessee, a private limited Company carrying on banking business, held certain Government securities which formed part of its trading assets. For the assessment year 1949-50 its income was assessed as follows : (i) interest on securities, Rs. 84,880 ; (ii) other banking activities. (loss), Rs. 64,400 ; (iii) net loss, Rs. 55,912. For the three succeeding years the Income-tax Officer allowed the loss to be set off against the income under the head "business" but disallowed it against the income under the head "interest on securities". This was confirmed by the Appellate Assistant Commissioner and the Tribunal. On a reference, the High Court remitted the case to the Tribunal for making a fuller statement of the case. The Tribunal, on further hearing, held that the receipt of interest from securities was as much the assessee's business as its other banking activities like receiving deposits from the clients and withdrawals by them. On receipt of the supplementary statement of case, the High Court held that the assessee was entitled to set off the business loss against the entire income including interest on securities. On appeal to Supreme Court,

Held, that under section 24 (2) of the Indian Income-tax Act, 1922, the income from the securities which formed part of the assessee's trading assets was part of its income in the business and, therefore, the loss incurred in the business in the earlier year could be set off against that income also in the succeeding years.

The scheme of the Income-tax Act is that income-tax is one tax. Section 6 only classifies the taxable income under different heads for the purpose of computation of the net income of the assessee. Though for the purpose of computation of the income, interest on securities is separately classified, income by way of interest from securities do not cease to be part of the income from business if the securities are part of the trading assets.

Whether a particular income is part of the income from a business falls to be decided not on the basis of the provisions of section 6 but on commercial principles.

Clause (2) of section 24 in contradistinction to clause (1) thereof, is concerned only with the business and not with its heads under section 6. Section 24, therefore, is enacted to give further relief to an assessee carrying on a business and incurring loss in the business though the income therefrom falls under different heads under section 6.

Appeal by Special Leave from the Judgment and Order dated 8th August, 1961, of the Andhra Pradesh High Court in Case Referred No. 25 of 1957.

S. V. Gupte, Solicitor-General of India (*N. D. Karkhanis* and *R. N. Sachthey*, Advocates, with him), for Appellant (In all the Appeals).

G. S. Pathak, Senior Advocate (*B. Datta* and *T. Satyanarayana*, Advocates, with him), for Respondent (In all the Appeals).

The Judgment of the Court was delivered by

Subba Rao, J.—These appeals by Special Leave raise the question of construction of section 24 (2) of the Indian Income-tax Act, 1922, hereinafter called the Act.

The material facts may briefly be stated. The Cocanada Bank, Ltd., Kakinada, hereinafter called the assessee, is a private limited company carrying on banking business with its head office at Kakinada and a branch at Dayal Bagh. The assessee's sources of income are banking business and interest from Government securities. For the assessment year 1949-50 its income was assessed as follows :

Interest on securities	..	Rs. 84,880
Other banking activities	..	Rs. 64,400 (loss)
net loss	..	Rs. 55,912

The following tabular form shows at a glance the factual position in regard to the income of the assessee under different heads during the said three years :

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* C.A. Nos. 155 to 157 of 1964. 2nd April, 1965.

Year of assessment	*Interest on securities*	*Business income or loss (as finally decided by the A.A.C.)*	*Total*
(1)	(2)	(3)	(4)
	Rs.	Rs.	Rs.
1. 1950—51	5,191	886	6,077
2. 1951—52	2,174	1,177	3,351
3. 1952—53	1,885	9,121	11,006

For the three succeeding years the Department showed the income under the said two separate heads but allowed the said loss to be set-off against the income under the head " business " and disallowed it against the income under the head " interest on securities ". The view of the Income-tax Officer was confirmed, on appeal, by the Appellate Assistant Commissioner and, on further appeal, by the Income-tax Appellate Tribunal. The following question was referred by the Tribunal to the High Court for its opinion :

" Whether on the facts and in the circumstances of the case, the assessee was entitled to set off the business loss of Rs. 55,912 brought forward from the preceding year against the entire income including interest on securities held by the assessee."

The High Court, having regard to the decision of this Court in *United Commercial Bank, Ltd.* v. *Commissioner of Income-tax, West Bengal*[1], remitted the case to the Income-tax Tribunal, Hyderabad Bench, for making a fuller statement of case on the question whether these securities in question formed part of the trading assets held by the assessee in the course of its business as a banker and whether its dealing with the securities from which it received interest was as much the assessee's business as receiving deposits from clients and withdrawals by them. The Income-tax Tribunal, on a further hearing, held that the receipt of interest from securities was as much the assessee's business as its other banking activities like receiving deposits from the clients and withdrawals by them. On receipt of the supplementary statement of case from the Tribunal the High Court answered the reference in favour of the assessee. Hence the present appeals.

Learned Counsel for the Revenue argued that the income from business and securities fell under different heads, namely, section 10 and section 8 of the Act respectively, that they were mutually exclusive and, therefore, the losses under the head " business " could not be carried forward from the preceding year to the succeeding year and set-off under section 24 (2) of the Act against the income from securities held by the assessee.

Learned Counsel for the assessee, on the other hand, contended that though for the purpose of computation of income, the income from securities and the income from business were calculated separately, in a case where the securities were part of the trading assets of the business, the income therefrom was part of the income of the business and, therefore, the losses incurred under the head " business " could be set-off during the succeeding years against the total income of the business, *i.e.*, income from the business including the income from the securities.

The relevant section of the Act which deals with the matter of set-off of losses in computing the aggregate income is section 24. The relevant part of it, before the Finance Act, 1955, read :

" (1) Where any assessee sustains a loss of profits or gains in any year under any of the heads mentioned in section 6, he shall be entitled to have the amount of the loss set-off against his income, profits or gains under any other head in that year :

* * * * *

1. (1958) 1 An.W.R. (S.C.) 26 : (1958) 1 M.L.J. (S.C.) 26 : (1958) S.C.J. 46 : (1957) 32 I.T.R. 688 : (1958) S.C.R. 79 : A.I.R. 1957 S.C. 918.

(2) Where any assessee sustains a loss of profits or gains in any year, being a previous year not earlier than the previous year for the assessment for the year ending on the 31st day of March, 1940, in any business, profession or vocation, and the loss cannot be wholly set-off under sub-section (1), so much of the loss as is not so set-off or the whole loss where the assessee had no other head of income shall be carried forward to the following year and set-off against the profits and gains, if any, of the assessee from the same business, profession or vocation for that year ; and if it cannot be wholly so set-off, the amount of loss not so set off shall be carried forward to the following year....

* * * * *."

While sub-section (1) of section 24 provides for setting off of the loss in a particular year under one of the heads mentioned in section 6 against the profit under a different head in the same year, sub-section (2) provides for the carrying forward of the loss of one year and setting off of the same against the profit or gains of the assessee from the same business in the subsequent year or years. The crucial words, therefore, are " profits and gains of the assessee from the same business", *i.e.*, the business in regard to which he sustained loss in the previous year. The question, therefore, is whether the securities formed part of the trading assets of the business and the income therefrom was income from the business. The answer to this question depends upon the scope of section 6 of the Act. Section 6 of the Act classified taxable income under the following several heads: (i) salaries ; (ii) interest on securities ; (iii) income from property ; (iv) profits and gains of business, profession or vocation ; (v) income from other sources ; and (vi) capital gains. The scheme of the Act is that income-tax is one tax. Section 6 only classifies the taxable income under different heads for the purpose of computation of the net income of the assessee. Though for the purpose of computation of the income, interest on securities is separately classified, income by way of interest from securities does not cease to be part of the income from business if the securities are part of the trading assets. Whether a particular income is part of the income from a business falls to be decided not on the basis of the provisions of section 6 but on commercial principles. To put it in other words, did the securities in the present case which yielded the income form part of the trading assets of the assessee ? The Tribunal and the High Court found that they were the assessee's trading assets and the income therefrom was, therefore, the income of the business. If it was the income of the business, section 24 (2) of the Act was immediately attracted. If the income from the securities was the income from its business, the loss could, in terms of that section be set-off against that income.

A comparative study of sub-sections (1) and (2) of section 24 yields the same result. While in sub-section (1) the expression " head " is used, in sub-section (2) the said expression is conspicuously omitted. This designed distinction brings out the intention of the Legislature. The Act provides for the setting off of loss against profits in four ways. To illustrate, take the head "profits and gains of business, profession or vocation ". An assessee may have two businesses. In ascertaining the income in each of the two businesses, he is entitled to deduct the losses incurred in respect of each of the said businesses. So calculated, if he has loss in one business and profit in the other both falling under the same head, he can set-off the loss in one against the profit in the other in arriving at the income under that head. Even so he may still sustain loss under the same head. He can then set-off the loss under the head " business " against profits under another head, say " income from investments ", even if investments are not part of the trading assets of the business. Notwithstanding this process he may still incur loss in his business. Section 24 (2) says that in that event he can carry forward the loss to the subsequent year or years and set-off the said loss against the profit in the business. Be it noted that clause (2) of section 24, in contradistinction to clause (1) thereof, is concerned only with the business and not with its heads under section 6 of the Act. Section 24, therefore, is enacted to give further relief to an assessee carrying on a business and incurring loss in the business though the income therefrom falls under different heads under section 6 of the Act.

Some of the decisions cited at the Bar may conveniently be referred to at this stage. The Judicial Committee in *The Punjab Co-operative Bank Ltd.* v. *Commis-*

sioner of Income-tax, Punjab[1], has clearly brought out the business connection between the securities of a bank and its business, thus :

> "In the ordinary case of a bank, the business consists in its essence of dealing with money and credit. Numerous depositors place their money with the bank often receiving a small rate of interest on it. A number of borrowers receive loans of a large part of these deposited funds at somewhat higher rates of interest. But the banker has always to keep enough cash or easily realisable securities to meet any probable demand by the depositors......"

In the present case the Tribunal held, on the evidence, and that was accepted by the High Court, that the assessee was investing its amounts in easily realisable securities and therefore, the said securities were part of the trading assets of the assessee's banking business. The decision of this Court in *United Commercial Bank Ltd.* v. *Commissioner of Income-tax, West Bengal*[2], does not lay down any different proposition. It held, after an exhaustive review of the authorities, that under the scheme of the Income-tax Act, 1922, the head of income, profits and gains enumerated in the different clauses of section 6 were mutually exclusive, each specific head covering items of income arising from a particular source. On that reasoning this Court held that even though the securities were part of the trading assets of the company doing business, the income therefrom had to be assessed under section 8 of the Act. This decision does not say that the income from securities is not income from the business. Nor does the decision of this Court in *East India Housing and Land Development Trust Ltd.* v. *Commissioner of Income-tax, West Bengal*[3] support the contention of the Revenue. There, a company, which was incorporated with the objects of buying and developing landed properties and promoting and developing markets, purchased 10 bighas of land in the town of Calcutta and set up a market therein. The question was whether the income realised from the tenants of the shops and stalls was liable to be taxed as "business income" under section 10 of the Income-tax Act or as income from property under section 9 thereof. This Court held that the said income fell under the specific head mentioned in section 9 of the Act. This case also does not lay down that the income from the shops is not the income in the business. In *Commissioner of Income-tax, Madras* v. *Express Newspapers Ltd.*[4], this Court held that both section 26 (2) and the proviso thereto dealt only with profits and gains of a business, profession or vocation and they did not provide for the assessment of income under any other head *e.g.*, capital gains. The reason for that conclusion is stated thus :

> "It (the deeming clause in section 12-B) only introduces a limited fiction, namely, that capital gains accrued will be deemed to be income of the previous year in which the sale was effected. The fiction does not make them the profits or gains of the business. It is well settled that a legal fiction is limited to the purpose for which it is created and should not be extended beyond its legitimate field........ The profits and gains of business and capital gains are two distinct concepts in the Income-tax Act ; the former arises from the activity which is called business and the latter accrues because capital assets are disposed of at a value higher than what they cost the assessee. They are placed under different heads ; they are derived from different sources ; and the income is computed under different methods. The fact that the capital gains are connected with the capital assets of the business cannot made them the profit of the business. They are only deemed to be income of the previous year and not the profits or gains arising from the business during that year."

It will be seen that the reason for the conclusion was that capital gains were not income from the business. Though some observations divorced from context may appear to be wide, the said decision was mainly based upon the character of the capital gains and not upon their non-inclusion under the heading "business". The limited scope of the earlier decision was explained by this Court in *Commissioner of Income-tax, Bombay City I* v. *Chugandas & Co.*[1]. Therein this Court held that interest from securities formed part of the assessee's business income for the purpose of exemption under section 25 (3). Shah, J., speaking for the Court, observed :

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1. (1940) 8 I.T.R. 635, 645 : L.R. 67 I.A. 464 : 43 Bom. L.R. 372 : A.I.R. 1940 P.C. 230.
2. (1958) S.C.J. 46 : (1958) 1 M.L.J. (S.C.) 26 : (1958) 1 An. W.R. (S.C.) 26 : (1958) S.C.R. 79 : (1957) 32 I.T.R. 688 : A.I.R. 1957 S.C. 918.
3. (1961) 42 I.T.R. 49.
4. (1964) 2 I.T.J. 221 : (1964) 2 S.C.J. 405 : (1964) 53 I.T.R. 250, 260 : A.I.R. 1965 S.C. 33.
1. (1965) 55 I.T.R. 17, 24 : (1964) 2 I.T.J. 281 : (1965) 1 S.C.J. 49 : A.I.R. 1965 S.C. 568.

"The heads described in section 6 and further elaborated for the purpose of computation of income in sections 7 to 10 and 12, 12-A, 12-AA and 12-B are intended merely to indicate the classes of income ; the heads do not exhaustively delimit sources from which income arises. This is made clear in the judgment of this Court in the *United Commercial Bank Ltd.'s case*[2], that business income is broken up under different heads only for the purpose of computation of the total income ; by that break up the income does not cease to be income of the business, the different heads of income being only the classification prescribed by the Indian Income-tax Act for computation of income."

The same principle applies to the present case.

We, therefore, hold that under section 24 (2) of the Act the income from the securities which formed part of the assessee's trading assets was part of its income in the business and, therefore, the loss incurred in the business in the earlier year could be set-off against that income also in the succeeding years.

In the result, we hold that the High Court was right in answering the question referred to it in the affirmative. The appeals are dismissed with costs. One hearing fee.

Appeals dismissed

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, M. HIDAYATULLAH AND J. R. MUDHOLKAR, JJ.

S. Varadarajan .. *Appellant**

v.

The State of Madras .. *Respondent.*

Penal Code (XLV of 1860), section 361—Taking minor out of keeping of lawful guardian—"Taking"—Meaning of—Minor girl knowing and having capacity to know that she was doing joining accused voluntarily—Accused not guilty of "taking".

Taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping a minor from lawful guardianship under section 361 of the Indian Penal Code. Where a minor girl leaves her father's protection knowing and having capacity to know the full import of what she was doing—in the instant case a senior college student on the verge of attaining majority—and voluntarily joins the accused person permitting him to take her wherever he liked and marries him of her own accord, the accused cannot be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in such a case and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian. It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. If evidence to establish one of those things is lacking, it would not be legitimate to infer that the accused is guilty of *taking* the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, she joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfilment of the intention of the girl. That part falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is therefore not tantamount to "taking".

Appeal by Special Leave from the Judgment and Order dated 22nd March, 1963, of the Madras High Court in Criminal Appeal No. 114 of 1961.

A. V. Viswanatha Sastri, Senior Advocate, (*K. Jayaram* and *R. Ganapathy Iyer*, Advocates, with him), for Appellant.

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2. (1958) S.C.J. 46 : (1958) 1 M.L.J. (S.C.) 26 : (1958) 1 An.W.R. (S.C.) 26: (1958) S.C.R. 79 : (1957) 32 I.T.R. 688 : A.I.R. 1957 S.C. 198.

* Crl.A. No. 46 of 1963. 9th September, 1964.

A. Ranganadham Chetty, Senior Advocate (*A. V. Rangam*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Mudholkar, J.—This is an appeal by Special Leave from the judgment of the High Court of Madras affirming the conviction of the appellant under section 363 of the Indian Penal Code and sentence of rigorous imprisonment for one year awarded by the Fifth Presidency Magistrate, Egmore, Madras.

Savitri, P.W. 4, is the third daughter of S. Natarajan, P.W. 1, who is an Assistant Secretary to the Government of Madras in the Department of Industries and Co-operation. At the relevant time, he was living on 6th Street, Lake area, Nungabakkam, along with his wife and two daughters, Rama, P.W. 2, and Savitri, P.W. 4. The former is older than the latter and was studying in the Madras Medical College while the latter was a student of the second year B.Sc. Class in Ethiraj College.

A few months before 30th September, 1960, Savitri became friendly with the appellant Varadarajan who was residing in a house next door to that of S. Natarajan. The appellant and Savitri used to carry on conversation with each other from their respective houses. On 30th September, 1960, Rama found them talking to each other in this manner at about 9-00 A.M. and had also seen her talking like this on some previous occasions. That day she asked Savitri why she was talking with the appellant. Savitri replied saying that she wanted to marry the appellant. Savitri's intention was communicated by Rama to their father when he returned home at about 11-00 A.M. on that day. Thereupon Natarajan questioned her. Upon being questioned Savitri started weeping but did not utter a word. The same day Natarajan took Savitri to Kodambakkam and left her at the house of a relative of his, K. Natarajan, P.W. 6, the idea being that she should be kept as far away from the appellant as possible for some time.

On the next day, *i.e*, on 1st October, 1960, Savitri left the house of K. Natarajan at about 10-00 A.M. and telephoned to the appellant asking him to meet her on a certain road in that area and then went to that road herself. By the time she got there the appellant had arrived there in his car. She got into it and both of them went to the house of one P.T. Sami at Mylapore with a view to take that person along with them to the Registrar's Office to witness their marriage. After picking up Sami they went to the shop of Govindarajulu Naidu in Netaji Subhas Chandra Bose Road and the appellant purchased two *Gundus* and *Tirumangalyam* which were selected by Savitri and then proceeded to the Registrar's Office. Thereafter the agreement to marry entered into between the appellant and Savitri, which was apparently written there, was got registered. Thereafter the appellant asked her to wear the articles of jewellery purchased at Naidu's shop and she accordingly did so. The agreement which these two persons had entered into was attested by Sami as well as by one P.K. Mar, who was a co-accused before the Presidency Magistrate but was acquitted by him. After the document was registered the appellant and Savitri went to Ajanta Hotel and stayed there for a day. The appellant purchased a couple of sarees and blouses for Savitri the next day and then they went by train to Sattur. After a stay of a couple of days there, they proceeded to Sirukulam on 4th October, and stayed there for 10 or 12 days. Thereafter they went to Coimbatore and then on to Tanjore where they were found by the Police who were investigating into a complaint of kidnapping made by S. Natarajan and were then brought to Madras on 3rd November.

It may be mentioned that as Savitri did not return to his house after she went out on the morning of 1st October. K. Natarajan went to the house of S. Natarajan in the evening and enquired whether she had returned home. On finding that she had not, both these persons went to the Railway Station and various other places in search of Savitri. The search having proved fruitless, S. Natarajan went to the Nungambakkam Police Station and lodged a complaint stating there that Savitri was a minor on that day and could not be found. Thereupon the Police took up

investigation and ultimately apprehended, as already stated, the appellant and Savitri at Tanjore.

It is not disputed that Savitri was born on 13th November, 1942 and that she was a minor on 1st October. The other facts which have already been stated are also not disputed. A two-fold contention was, however, raised and that is: in the first place Savitri had abandoned the guardianship of her father and in the second place that the appellant in doing what he did, did not in fact take away Savitri out of the keeping of her lawful guardian.

The question whether a minor can abandon the guardianship of his or her own guardian and if so the further question whether Savitri could, in acting as she did, be said to have abandoned her father's guardianship may perhaps not be very easy to answer. Fortunately, however, it is not necessary for us to answer either of them upon the view which we take on the other question raised before us and that is that "taking" of Savitri out of the keeping of her father has not been established. The offence of "kidnapping from lawful guardianship" is defined thus in the first paragraph of section 361 of the Indian Penal Code:

> "Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian is said to kidnap such minor or person from lawful guardianship."

It will thus be seen that taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping. Here, we are not concerned with enticement but what we have to find out is whether the part played by the appellant amounts to "taking" out of the keeping of the lawful guardian of Savitri. We have no doubt that though Savitri had been left by S. Natarajan at the house of his relative K. Natarajan she still continued to be in the lawful keeping of the former but then the question remains as to what is it which the appellant did that constitutes in law "taking". There is not a word in the deposition of Savitri from which an inference could be drawn that she left the house of K. Natarajan at the instance or even a suggestion of the appellant. In fact she candidly admits that on the morning of 1st October, she herself telephoned to the appellant to meet her in his car at a certain place, went up to that place and finding him waiting in the car got into that car of her own accord. No doubt, she says that she did not tell the appellant where to go and that it was the appellant himself who drove the car to Guindy and then to Mylapore and other places. Further, Savitri has stated that she had decided to marry the appellant. There is no suggestion that the appellant took her to the Sub-Registrar's Office and got the agreement of marriage registered there (thinking that this was sufficient in law to make them man and wife) by force or blandishments or anything like that. On the other hand the evidence of the girl leaves no doubt that the insistence of marriage came from her side. The appellant, by complying with her wishes can by no stretch of imagination be said to have taken her out of the keeping of her lawful guardian. After the registration of the agreement both the appellant and Savitri lived as man and wife and visited different places. There is no suggestion in Savitri's evidence, who, it may be mentioned had attained the age of discretion and was on the verge of attaining majority that she was made by the appellant to accompany him by administering any threat to her or by any blandishments. The fact of her accompanying the appellant all along is quite consistent with Savitri's own desire to be the wife of the appellant in which the desire of accompanying him wherever he went was of course implicit. In these circumstanes we find nothing from which an inference could be drawn that the appellant had been guilty of taking away Savitri out of the keeping of her father. She willingly accompanied him and the law did not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany him. She was not a child of tender years who was unable to think for herself but, as already stated, was on the verge of attaining majority and was capable of knowing what was good and what was bad for her. She was no uneducated or unsophisti-

cated village girl but a senior college student who had probably all her life lived in a modern city and was thus far more capable of thinking for herself and acting on her own than perhaps an unlettered girl hailing from a rural area. The learned Judge of the High Court has referred to the decision In re *Abdul Sathar*[1], in which it was held that where the evidence disclosed that, but for something which the accused consented to do and ultimately did, a minor girl would not have left her husband's house, or would not have been able to leave her husband's house, there was sufficient taking in law for the purpose of section 363 and expressing agreement with this statement of the law observed :

"In this case the minor, P.W. 4 would not have left the house but for the promise of the appellant that he would marry her."

Quite apart from the question whether this amount to blandishment we may point out that this is not based upon any evidence direct or otherwise. In *Abdul Sathar's case*[1], Srinivasa Aiyangar, J., found that the girl whom the accused was charged with having kidnapped was desperately anxious to leave her husband's house and even threatened to commit suicide if she was not taken away from there and observed :

" If a girl should have been wound up to such a pitch of hatred of her husband and of his house or household and she is found afterwards to have gone out of the keeping of her husband, her guardian, there must undoubtedly be clear and cogent evidence to show that she did not leave her husband's house herself and that her leaving was in some manner caused or brought about by something that the accused did. "

In the light of this observation the learned Judge considered the evidence and came to the conclusion that there was some legal evidence upon which a Court of fact could find against the accused. This decision, therefore, is of little assistance in this case because as already stated, every essential step was taken by Savitri herself: it was she who telephoned to the appellant and fixed the rendezvous, she walked up to that place herself and found the appellant waiting in the car ; she got into the car of her own accord without the appellant asking her to step in and permitted the appellant to take her wherever he liked. Apparently her one and only intention was to become the appellant's wife and thus be in a position to be always with him.

The learned Judge also referred to a decision in *R. v. Kumarasami*[2], which was a case under section 498 of the Indian Penal Code. It was held there that if whilst the wife was living with her husband, a man knowingly went away with her in such a way as to deprive the husband of his control over her with the intention stated in the section, it would be a taking from the husband within the meaning of the section.

It must, however, be borne in mind that there is a distinction between " taking " and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purposes of section 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.

It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do

1. (1927) 54 M.L.J. 456 ; A.I.R. 1928 Mad. 585. 2. 2 M.H.C.R. 331.

so. In our opinion, if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfilment of the intention of the girl. That part, in our opinion, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to "taking".

The case before us is not of a kind considered by Srinivasa Aiyangar, J., in that the facts established do not show that Savitri would not have left K. Natarajan's house in which her father had left her without the active help of the appellant.

In the next decision, that is, that in *Kumarasami's case*[1], upon which the High Court has relied, in was observed that the fact that a married woman whom the accused was alleged to have taken or enticed away for certain purposes was a temptress, would make no difference and the accused who yielded to her solicitations would be guilty of an offence under section 498 (*b*) of the Penal Code. This decision was approved of in In re *Sundara Dass Tiwari*[2], a case to which also the High Court has referred. The basis of both these decisions appears to be that depriving the husband of his proper control over his wife, for the purpose of illicit intercourse is the gist of the offence of taking away a wife under the same section and that detention occasioning such deprivation may be brought about simply by the influence of allurement and blandishment. It must be borne in mind that while sections 497 and 498, Indian Penal Code, are meant essentially for the protection of the rights of the husband, section 361 and other cognate sections of the Indian Penal Code are intended more for the protection of the minors and persons of unsound mind themselves than of the rights of the guardians of such persons. In this connection we may refer to the decision in *State* v. *Harbansing Kisansing*[3]. In that case Gajendragadkar, J., (as he then was) has, after pointing out what we have said above, observed :

"It may be that the mischief intended to be punished partly consists in the violation or the infringement of the guardians' right to keep their wards under their care and custody ; but the more important object of these provisions undoubtedly is to afford security and protection to the words themselves."

While, therefore, it may perhaps be argued on the basis of the two Madras decisions that the word "taking" occurring in sections 497 and 498 of the Indian Penal Code should be given a wide interpretation so as to effectuate the object under lying these provisions there is no reason for giving to that word a wide meaning in the context of the provisions of section 361 and cognate sections.

The last case relied upon by the High Court is *Ramaswami Udayar* v. *Raju Udayar*[4] which is also a case under section 498, Indian Penal Code. In that case the High Court has followed the two earlier decisions of that Court to which we have made reference but in the course of the judgment the learned Judge has observed that it is not open to a minor in law to abandon her guardian, and that, therefore, when the minor leaves the guardian of her own accord and when she comes into the custody of the accused person, it is not necessary that the latter should be shown to have committed an overt act before he could be convicted under section 498. The learned Judge has further observed :

"A woman's free will, or her being a free agent, or walking out of her house of her own accord are absolutely irrelevant and immaterial for the offence under section 498."

Whatever may be the position with respect to an offence under that section and even assuming that a minor cannot in law abandon the guardianship of her lawful guardian, for the reason which we have already stated, the accused person in whose

1. 2 M.H.C.R. 331.
2. 4 M.H.C.R. 20.
3. I.L.R. 1954 Bom. 784.
4. (1952) 2 M.L.J. 212.

company she is later found cannot be held guilty of having taken her out of the keeping of her guardian unless something more is established.

The view which we have taken accords with that expressed in two decisions reported in Cox's Criminal Cases. The first of them is *Rex*. v. *Christian Olifir*[1]. In that case Baron Bramwell stated the law of the case to the jury thus :

> " I am of opinion that if a young woman leaves her father's house without any persuasion, inducement or blandishment held out to her by a man, so that she has got faily away from home, and then goes to him, although it may be his moral duty to return her to her parent's custody, yet his not doing so is no infringement of this Act of Parliament (24 and 25, Vict. c. 100, section 55) for the Act does not say he shall restore her, but only that he shall not take her away. "

The jury returned a verdict of guilty in this case because the girl's evidence showed, that the initial formation of her intention to leave her father's house was influenced by the solicitations of the accused and by his promise to marry her.

The other case is *Rex* v. *James Jarvis*[2]. There Jelf, J., has stated the law thus to the Jury :

> " Although there must be a taking, yet it is quite clear that an actual physical taking away of the girl is not necessary to render the prisoner liable to conviction ; it is sufficient if he persuaded her to leave her home or go away with him by persuasion or blandishments. The question for you is whether the active part in the going away together was the act of the prisoner or of the girl ; unless it was that of the prisoner, he is entitled to your verdict. And, even if you do not believe that he did what he was morally bound to do—namely, tell her to return home—that fact is not by itself sufficient to warrant a conviction : for if she was determined to leave her home, and showed prisoner that that was her determination, and insisted on leaving with him—or even if she was so forward as to write and suggest to the prisoner that he should go away with her, and he yielded to her suggestion, taking no active part in the matter, you must acquit him. If, however, prisoner's conduct was such as to persuade the girl, by blandishments or otherwise, to leave her home either then or at some future time, he ought to be found guilty of the offence of abduction. "

In this case there was no evidence of any solicitation by the accused at any time and the jury returned a verdict of ' not guilty '. Further, there was no suggestion that the girl was incapable of thinking for herself and making up her own mind.

The relevant provisions of the Penal Code are similar to the provisions of the Act of Parliament referred to in that case.

Relying upon both these decisions and two other decisions, the law in England is stated thus in Halsbury's Laws of England, third edition, volume 10, at page 758 :

> " The defendant may be convicted, although he took no part in the actual removal of the girl, if he previously solicited her to leave her father, and afterwards received and harboured her when she did so. If a girl leaves her father of her own accord, the defendant taking no active part in the matter and not persuading or advising her to leave, he cannot be convicted of this offence, even though he failed to advise her not to come, or to return, and afterwards harboured her. "

On behalf of the appellant reliance was placed before us upon the decisions in *Rajappan* v. *State of Kerala*[3], and *Chathu* v. *Govindan Kutty*[4]. In both the cases the learned Judges have held that the expression " taking out of the keeping of the lawful guardian " must signify some act done by the accused which may be regarded as the proximate cause of the person going out of the keeping of the guardian ; or, in other words an act but for which the person would not have gone out of the keeping of the guardian as he or she did. In taking this view the learned Judge followed amongst other decisions, the two English decisions to which we have adverted. More or less to the same effect is the decision in *Nura* v. *Rex*[5]. We do not agree with everything that has been said in these decisions and would make it clear that the mere circumstance that the act of the accused was not the immediate cause of the girl leaving her father's protection would not absolve him if he had at an earlier stage solicited her or induced her in any manner to take this step.

1. X Cox's Criminal Cases, 402.
2. XX Cox's Criminal Cases, 249.
3. I.L.R. 1960 Ker. 481.
4. (1957) M.L.J. (Crl.) 516 : I.L.R. 1957 Ker. 591.
5. A.I.R. 1949 All. 710.

As against this Mr. Ranganadham Chetty appearing for the State has relied upon the decisions in *Biswaswar Misra* v. *The King*[1], and In re *Khalandar Saheb*[2]. The first of these decisions is distinguishable on the ground that it was found that the accused had induced the girl to leave the house of her lawful guardian. Further the learned Judges have made it clear that mere passive consent on the part of a person in giving shelter to the minor does not amount to taking or enticing of the minor but the active bringing about of the stay of the minor in the house of a person by playing upon the weak and hesitating mind of the minor would amount to "taking" within the meaning of section 361. In the next case, the act of the accused upon the facts of the case was held by the Court to fall under section 366, Indian Penal Code and the decision in *Nura* v. *Rex*[4], on which reliance has been placed on behalf of the appellant is distinguished. Referring to that case it was observed by the Court:

"Reliance is placed upon the decision of Mustaq Ahmed, J., in *Nura* v. *Rex*[3], wherein the learned Judge observed that where a minor girl voluntarily leaves the roof of her guardian and when out of his house, comes across another who treats her with kindness, he cannot be held guilty under section 361, Indian Penal Code. This decision cannot help the accused for, on the facts of that case, it was found that the girl went out of the protection of her parents of her own accord and thereafter went with the accused .... In the present case it is not possible to hold that she is not under the guardianship of her father. In either contingency, namely, whether she went out to answer calls of nature, or whether she went to the house of the accused pursuant to a previous arrangement, she continued to be under the guardianship of her father. On the evidence, it is not possible to hold that she abandoned the guardianship of her father and, thereafter, the accused took her with him."

After pointing out that there is an essential distinction between the words "taking" and "enticing" it was no doubt observed that the mental attitude of the minor is not of relevance in the case of taking and that the word "take" means to cause to go, to escort or to get into possession. But these observations have to be understood in the context of the facts found in that case. For, it had been found that the minor girl whom the accused was charged with having kidnapped had been persuaded by the accused when she had gone out of her house for answering the call of nature, to go along with him and was taken by him to another village and kept in his uncle's house until she was restored back to her father by the uncle later. Thus, here there was an element of persuasion by the accused person which brought about the willingness of the girl and this makes all the difference. In our opinion, therefore, neither of these decisions is of assistance to the State.

We are satisfied, upon the material on record, that no offence under section 363 has been established against the appellant and that he is, therefore, entitled to acquittal. Accordingly we allow the appeal and set aside the conviction and sentence passed upon him.

V.K.

Appeal allowed ;
conviction set aside.

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1. I.L.R. 1949 Cuttak. 194.
2. (1954) M.L.J. (Andh.) 234 ; I.L.R. 1955 Andhra 290.
3. A.I.R. 1949 All. 710.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, J. C. SHAH AND R. S. BACHAWAT, JJ.

The Commissioner, Madras Hindu Religious and Charitable Endowments, Madras .. *Appellant**.

v.

Narayana Ayyangar and others .. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (*XIX of* 1951), *section* 6 (13)—*Fund for feeding Brahmins on the occasion of* Rathothsavam *in the village temple and use of surplus for* Vanabhojanam *on specified occasions—If a public charity and religious charity—Jurisdiction—Commissioner of the Endowments Board to bring the Fund under his control.*

Setting up a fund for feeding Brahmins is a public charity. Where the primary purpose of the charity is to feed Brahmin pilgrims attending the *Rathothsavam* in the local shrine, the public charity has a real connection with the *Rathothsavam* which is a Hindu festival of a religious character and therefore it is a religious charity within the meaning of section 6 (13) of Madras Hindu Religious and Charitable Endowments Act XIX of 1951 ; It was not suggested that the fund is not a religious charity by reason of the utilisation of the surplus fund in *Vanabhojanam* in the month of *Karthigai* and on the day following *Vaikunta Ekadasi*.

Therefore the Endowments Commissioner has jurisdiction to bring the fund under his control.

Appeal by Special Leave from the Judgment and Decree dated 1st November, 1960, of the Madras High Court in Appeal No. 199 of 1957.†

A. Ranganadham Chetty, Senior Advocate (*A. V. Rangam*, Advocate, with him), for Appellant.

A. V. Viswanatha Sastri, Senior Advocate, (*R. Thiagarajan*, Advocate, with him), for Respondents Nos. 1 and 2.

The Judgment of the Court was delivered by

Shah, J.—Venkatarama Iyengar, Kasthuri Iyengar and Ranga Iyengar, residents of the village Kariamanikam in Tiruchirappali District, with the aid of contributions, subscriptions and donations set up a *Samaradhanai* Fund for feeding Brahmin pilgrims attending Sri Venkatachalapathiswami shrine at village Gunaseelam on the occasion of *Rathothsavam* festival. Between the years 1936 and 1940 seven acres of land were purchased for Rs. 10,500 to provide a permanent income for the Fund. It was found that the expenses incurred for the *Rathothsavam* festival did not exhaust the entire income and the balance was utilised for *Vanabhojanam* in Kariamanikam village in the month of *Karthigai* and on the *Dwadasi* following *Vaikunta Ekadasi* day.

The President, Hindu Religious and Charitable Endowments Board, sought to levy for the years 1351 to 1354 *Fasli* contributions under section 69 of Madras Act II of 1927 in respect of the Fund. But in Suit No. 297 of 1947 on the file of the District Court at Tiruchirappalli that claim was disallowed. The District Court held that the charity was not a " specific endowment " within the meaning of Act II of 1927. After the Madras Hindu Religious and Charitable Endowmens Act XIX of 1951 was enacted, the Deputy Commissioner of Hindu Religious and Charitable Endowments initiated a fresh proceeding under section 57(*d*) of that Act and held that the *Samaradhanai* Fund was a " religious charity " within the meaning of section 6 (13) of the Act. Against that order an appeal was carried by the trustees of the Fund to the Commissioner of Hindu Religious and Charitable Endowments. The Commissioner held that feeding Brahmins in connection with the religious festival of Hindus was a public charity and also a religious charity within the meaning of section 6 (13) of Madras Act XIX of 1951.

The trustees of the Fund then instituted Suit No. 181 of 1954 in the Court of the Subordinate Judge, Tiruchirappalli to set aside the order of the Commissioner on the plea that the *Samaradhanai* Fund was a private charity not associated with any Hindu Festival or service in a temple and was not a religious charity or a specific

† (1961) 1 M.L.J. 198.

*C.A. No. 844 of 1963. 24th February, 1965.

endowment or a public charity, and that it could in no manner become subject to control of the Commissioner, Madras Hindu Religious and Charitable Endowments. The suit was resisted by the Commissioner contending that the Fund was held and administered for a religious charity *viz.*, feeding Brahmin pilgrims on the occasion of a Hindu festival. The Subordinate Judge held that the Fund was a public charity and that it was also " a religious charity " within the meaning of section 6 (13) of the Act, the charity being associated with the Hindu festival of *Rathothsavam* at the Gunaseelam temple. In appeal against the order of the Subordinate Judge dismissing the suit filed by the trustees, the High Court of Madras held that the *Samaradhanai* Fund was a public charity within the meaning of section 6(13) of the Act, but not being associated with any Hindu festival or observance of a religious character it was not a " religious charity " and the Commissioner had no jurisidiction to bring it under his control. The High Court accordingly allowed the appeal and decreed the suit filed by the trustees. With Special Leave, the Commissioner has appealed to this Court.

The only question which falls to be determined in this appeal is whether on the facts found by the Court of first instance and confirmed by the High Court, the *Samaradhanai* Fund is a " religious charity " within the meaning of section 6 (13) of Madras Act XIX of 1951. Clause (13) of section 6 defines " religious charity " as meaning " a public charity associated with a Hindu festival or observance of a religious character, whether it be connected with a math or temple or not ". The definition prescribes two conditions which go to constitute a religious charity : there must be a public charity and that charity must be associated with a Hindu festival or observance of a religious character. If these be fulfilled, a public charity will be a religious charity, even if it is not connected with a math or temple. The Subordinate Judge held on the evidence that the " charity " in question is a feeding charity conducted during the ten days of the *Rathothsavam* in the Prasanna Venkatachalapathiswami temple in Gunaseelam in the month *Purattasi*. Only Brahmins are fed and not other community people. There are similar feeding charities for the different communities conducted by the respective community people. The charity in question has no connection with the Gunaseelam temple in the sense that the food "prepared is not offered to the deity, and feeding is done not in the temple premises but at a separate place originally in a specially erected pandal and now in Seshagiri Iyer's Choultry (Dharamashala). The other communities are not fed at this charity * * * The temple authorities have no voice in the conduct of the feeding," and the High Court agreed with that view. The Subordinate Judge held on those findings that the *Samaradhanai* Fund was a public charity within the meaning of section 6 (13) and with that view also the High Court agreed. The Subordinate Judge also held that the charity was associated with the Hindu festival of *Rathothsavam* in Sri Prasanna Venkatachalapathiswami temple in Gunaseelam—*Rathothsavam* being an observance of a religious character when the deity is taken out in procession in a chariot—and therefore the charity in question was clearly one associated with a Hindu festival and also with the observance of a religious character. In disagreeing with that view, the High Court observed that the expression " associated with a Hindu festival or observance of a religious character " imported some unity of purpose or common object or common endeavour between the festival and the charity and in the absence of such unity, common object or common endeavour, the charity could not be regarded as a religious charity within the meaning of section 6 (13) of the Act. In the view of the High Court that feeding Brahmin pilgrims during the *Rathothsavam* festival of Sri Venkatachalapathiswami shrine at Gunaseelam did not constitute an association between the Fund and the *Rathothsavam* festival itself, for the trustees of the shrine conducting the festival " had no manner of check, control or supervision over the feeding charity or *Samaradhanai* Fund ", they could not insist upon the feeding being done during the festival, and " cessation or discontinuance of the feeding by the trustees of the feeding charity may constitute a breach of trust on their part but cannot in the least affect the due performance of the *Rathothsavam* festival itself ". They further observed that the belief of the founders of the charity that feeding Brahmins on the occasion of an important festival

was meritorious, will not establish "any link or connection" between the festival and the charity.

We are unable to agree with the view so expressed by the High Court. The expression "associated" in section 6(13) of Act XIX of 1951 is used having regard to the history of the legislation, the scheme and objects of the Act, and the context in which the expression occurs, as meaning "being connected with" or "in relation to". The expression does not import any control by the authorities who manage or administer the festival. A Hindu religious festival or observance may have a local significance, in that it is celebrated or observed in a particular locality in connection with a shrine, temple or *math*, or it may be a festival or observance celebrated generally without any connection with any temple or *math*. In the case of such general festivals or observances there is no one who can be so said to control the celebrations, and the definition of "religious charity" includes such general festivals and observances. It cannot be assumed that there must always be a set of persons who control the celebration of a festival or an observance. The test suggested by the High Court that in order that there should be, between the charity and the festival or observance such a relation that the administration of the charity must be controlled by those who celebrate the festival or observance in a temple or *math*, besides being inapt in the case of general festivals and observances can only be evolved if words which are not found in the definition of "religious charity" are added thereto.

Mr. Viswanath Sastri appearing on behalf of the respondent-trustees contended that the expression "associated with a Hindu festival or observance of a religious character" in the definition of "religious charity" implies that the public charity must be an integral part of the Hindu religious festival or observance. But there is nothing in the Act which indicates any such intention on the part of the Legislature. Mr. Sastri sought to give diverse illustrations in support of his contention that mere feeding of Brahmins on the occasion of a Hindu festival or observance will not amount to association within the meaning of section 6 (13). It is unnecessary to deal with these illustrations, for the definition contemplates a public charity which alone can be a religious charity if the other conditions are fulfilled. A voluntary celebration of an event of religious significance by feeding Brahmins does not make it a public charity. There must be an institution which may in law be regarded as a public charity, before it may by its association with a religious festival or observance be regarded as a religious charity. The association undoubtedly must be real and not imaginary, but to constitute association it is not predicated that the administration of public charity must be controlled by the persons responsible for celebrating the religious festival in a temple or *math* or be an integral part of the festival or observance.

On the facts found, it is clear that on the occasion of the *Rathotsavam* festival of Sri Prasanna Venkatachalapathiswami shrine, pilgrims from many places attend the festival and the object of the charity is to feed Brahmins attending the shrine on the occasion of this festival. It is not disputed that setting up a Fund for feeding Brahmins is a public charity. The primary purpose of the charity is to feed Brahmin pilgrims attending the *Rathotsavam*. This public charity has therefore a real connection with the *Rathotsavam* which is a Hindu festival of a religious character, and therefore it is a religious charity within the meaning of section 6 (13) of Madras Act XIX of 1951. Surplus income of the Fund is used in *Vanabhojanam* in the month of *Kartigai*, and on the day following the *Vaikunta Ekadeshi*. It is not suggested that on that account the Fund is not a "religious charity".

We therefore set aside the order passed by the High Court and restore the order passed by the Trial Court. There will be no order as to costs throughout.

K.S. *Appeal allowed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, J. C. SHAH AND R.S. BACHAWAT, JJ.

V. T. S. Thyagasundaradoss Thevar and others .. *Appellants**

v.

V. T. S. Sevuga Pandia Thevar and another .. *Respondents*.

Hindu Law—Impartible estate—Estate obtained under will—If self acquired or joint family property of holder—Madras Impartible Estates Act (II of 1904), section 4 (1)—Effect on self acquired impartible estate—Madras Estates (Abolition and Conversion into Ryotwari) Act (XXV of 1948), section 45 and rules 1 and 4 (1) of the Rules—Applicability.

Under the relevant clause of the will of 1895 the testator the then Zamindar of Seithur said "our son Sevuga Pandia Dorai avergal shall take the properties set out in *A* Schedule hereinafter our lifetime and hold and enjoy the same with absolute rights and from son to grandson and so on in succession." If the testator intended to bequeath an absolute interest to the legatee, he could not have done so in words clearer than the said words. It cannot be said that the testator was only recognising the rights of the son to the estate if he died intestate. Further the other absolute dispositions in the will used the same phraseology and it is a well settled rule of construction that the same words used in a document shall be given the same meaning unless there is a clear intention to the contrary. A particular will shall be construed on its own terms and it is not possible to derive any help from the construction of one will in construing the other will.

As the Zamindar got the estate as a legatee and not as a member of a joint Hindu family by right of survivorship, he got it absolutely in his own right under the terms of the will.

Though the Seithur Zamin was an impartible Estate under Madras Act II of 1904, it continued to be a self-acquired property of the Zamindar. Section 4 (1) of that Act did not by its own force convert a self-acquired impartible estate before the Act into a joint family estate thereafter.

As the Seithur Zamin is not an ancestral impartible estate in the hands of the Zamindar, it is outside the scope of section 45 of the Madras Estates Abolition Act. It follows that it will be governed by rules 1 and 4 (1) of the Rules made under the Act; Accordingly the sons and others entitled to maintenance cannot claim to share in the compensation or get maintenance under section 45 of the Act.

Appeal by Special Leave from the Judgment and Order dated 15th October, 1958, of the Special Tribunal, Madras High Court, in S.T.A. No. 10 of 1956.†

A. V. Viswanatha Sastri, Senior Advocate (*K.S. Champakesa Iyengar, S. Sankara Iyer* and *T. V. R. Tatachari*, Advocates, with him), for Appellants.

V. Vedantachari, G. Jagannathan and *R. Ganapathy Iyer*, Advocates, for Respondent No. 1.

The Judgment of the Court was delivered by

Subba Rao, J.—V. T.S. Sevuga Pandia Thevar, hereinafter called the Zamindar, was the Zamindar of the erstwhile estate of Seithur, an impartible estate, in Ramanathapuram District in the State of Madras. Originally this Zamindari was an ancestral impartible estate and it continued to be so in the hands of the Zamindar's father I. Sundaradoss Thevar. In the year 1895 the said Sundaradoss Thevar executed a will whereunder he gave this property to his son, the Zamindar. The Government of Madras, in exercise of the powers conferred on it under the Madras Estates (Abolition and Conversion into Ryotwari) Act XXVI of 1948, hereinafter called the Act, issued a notification dated 8th March, 1954, abolishing the said zamindari. Thereafter, under section 54-A of the Act the State Government deposited a sum of Rs. 68,589 with the Madras Estates Abolition Tribunal, Madurai, hereinafter called the Tribunal. On 17th January, 1955, the Zamindar filed before the Tribunal a claim for the recovery of the said amount under section 42 of the Act on the ground that the said estate was his separate property and, therefore, he was entitled to get the entire amount of compensation. His exclusive claim for the entire amount was resisted by his sons and others entitled to maintenance, *inter alia*, on the ground that the Estate was an ancestral impartible estate and, therefore, they were also entitled to share in the compensation or to get maintenance, as the case may be, under section 45 of the Act. The Tribunal held that the said estate was a joint family

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*C.A. No. 203 of 1963. 25th February, 1965.

† (1959) 1 M.L.J. 335: I.L.R. (1959) Mad. 601.

property and, therefore, the persons mentioned in section 45 of the Act were also entitled to a share in the compensation in the manner prescribed thereunder. Against the order of the Tribunal the Zamindar preferred an appeal to the High Court of Judicature at Madras making all the objectors respondents to that appeal. That appeal was heard by a Division Bench of the High Court consisting of Rajagopalan and Balakrishna Ayyar, JJ. It held that the said estate was not an ancestral impartible estate and that the Zamindar was exclusively entitled to the compensation deposited with the Tribunal. The objectors, by Special Leave, have preferred the present appeal to this Court.

Mr. A. V. Viswanatha Sastry, learned Counsel for the appellants contended that the Seithur Estate was an ancestral impartible estate and, therefore, the Tribunal rightly distributed the compensation between the appellants and the Zamindar in terms of section 45 of the Act. He elaborated this argument under different heads, which we shall consider *seriatim*.

The first contention of the learned Counsel is that under the will Sundaradoss Thevar did not bequeath the said estate to his son, the Zamindar, but the will only contained a recital as to the existence of the said estate and the fact that it would devolve after his death on his next heir, namely, the Zamindar. It is not disputed that on the date the will was executed the holder of an ancestral impartible estate could validly bequeath it to whomsoever he liked. The answer to the question raised, therefore, depends purely on the construction of the will.

The scheme of the will may briefly be stated thus : The testator at the time of his death owned an ancestral impartible estate called Seithur Zamin, a self-acquired zamin called the Elumalai Zamin and other movable and immovable properties. He had certain debts and other obligations to discharge ; he had to provide, after his death, for the maintenance of his mother, son, daughter, nephew and others. He gave *A* Schedule property, *i.e.*, the Seithur Zamin, to his son, the Zamindar ; *B* Schedule property, *i.e.*, Elumalai Zamin, to his nephew ; *C* Schedule property, to his daughter ; *D* Schedule property, to Chellam, who served his wives faithfully ; and *E* Schedule property to Muthiah Bhagavathar. In addition he made other bequests, directed his debts to be paid and other obligations discharged out of his entire estate. He appointed an Executor to carry out the terms of his will.

Strong reliance is placed by learned Counsel for the appellants on the preamble to the will, and, emphasizing on the words :

> "After us there is our only son Sevuga Pandia Dorai, aged 11 years, who is entitled to get all our properties as the heir and at present there is none excepting the said person."

an argument is advanced that the said words indicate the intention of the testator that the estate should go to his son as his heir. But the preamble was not the dispositive clause : it only gave the financial position of the testator, the persons to be provided for and declared his right to dispose of the property in favour of the persons mentioned in the will. Consistent with the preamble, the heading of the clauses making the bequests stated. "The arrangements made hereby are as follows". What follows were the arrangements made by him and not what the law of inheritance brought about. Under the will the testator bequeathed *A*, *B*, *C*, *D* and *E* Schedule properties to different persons and the clauses making the disposition were couched in the same terminology. Though different words were used in the document as translated, both the learned Counsel, who know Tamil, agreed that the same Tamil word was used for bequeathing the different properties to different persons. What is more, whenever the testator wanted to give an absolute estate to a legatee he used the same words of inheritance such as "shall enjoy hereditarily from son to grandson and so on in succession." It is a well settled rule of construction that the same words used in a document shall be given the same meaning unless there is a clear intention to the contrary. It is not disputed that in the case of *C*, *D* and *E* Schedules the said words of disposition conveyed an absolute interest to the legatees mentioned therein. If that be so, we cannot without violating the said rule of construction and without doing violence to the language used give a different

meaning to the clause containing the disposition of the *A* Schedule property in favour of the Zamindar. Under the relevant clause the testator said:

"Our son Sevuga Pandia Dorai avergal shall take the properties set out in *A* schedule hereinafter our lifetime and hold and enjoy the same with absolute rights and from son to grandson and so on in succession."

If the testator intended to bequeath an absolute interest to the legatee, he could not have done so in words clearer than the said words. We find it impossible to construe the said words to mean that the testator was only recognizing the rights of the son to the estate if he died intestate; that will be rewriting the will. The appointment of an Executor to administer all the properties, including the *A* Schedule property, is another indication that the said property was also subject to a bequest. The appointment of an Executor would not have arisen in respect of the *A* Schedule property if the said property had not been bequeathed under the will. Further the testator directed all the debts due by him to be paid out of his entire property including the *A* Schedule property. If the Zamindar was taking the impartible estate as an heir, he would take it free from the liabilities not binding on the estate. He was taking it subject to the liabilities not binding on the Estate, because he was taking it as a legatee and not as an heir. For instance, in the matter of purchase of Elumalai Zamin, which is admitted to be not a part of impartible estate, the testator borrowed money from others; he directed the Executor to discharge the said debt from and out of the *A* Schedule Property and the assets relating to the same irrespective of the property that might have been secured in respect of that debt. In respect of other obligations he directed them to be discharged from and out of the entire property bequeathed, including the *A* Schedule property. For instance, he directed the Executor to spend from the said two Zamins amounts necessary to meet the expenses for performing the marriage of his younger brother's son, Muthuswami Pandian, for palace construction and repair and also for making jewels for the wife of Muthuswami Pandian. He also directed him to spend from both the zamins the amounts necessary for performing and conducting festivals. What is more, some items of properties forming part of the impartible estate, *i.e.*, *A* Schedule property, were bequeathed to others. The following 3 items *prima facie* formed part of the Seithur Zamin; (1) a palace in the Seithur Zamin Estate; (2) pannai lands in the estate purchased from Dalava Mudaliar; and (3) pannai lands in Seithru Zamin in Devadanamkulam village; and pannai lands in Kooraipadugai punja in Pallathavu. Though the palace and pannai lands formed part of the impartible estate, under the will they were bequeathed to Muthuswami Pandian, Muthathal and others. Under the will the Zamindar got not only the impartible estate *i.e.*, the *A* Schedule property, but also properties other than *B*, *C*, *D* and *E* Schedules. The estate as well as other properties were bequeathed to him under the same clause couched in the same language. Therefore, it cannot be said that in respect of the *A* Schedule property there was no bequest and in respect of other properties there was a bequest. Such a construction will introduce inconsistency and incongruity in the dispositive clause. Briefly stated, the testator did not make any distinction in the matter of bequests between the impartible estate and his other properties. He divided all his properties into *A*, *B*, *C*, *D* and *E* Schedules. He asserted his absolute right to dispose of them. Having regard to the circumstances obtaining at the time of executing the will, by using appropriate words he bequeathed them in the manner described by him in the various clauses of the will. He gave to his only son most of the *A* Schedule property and also some other properties. *A* small part of the *A* Schedule property was bequeathed by him to others also. The *A* Schedule property and other properties were made equally liable to discharge some of the specified debts. There was a clear bequest of the *A* Schedule property to the Zamindar, subject to the obligations mentioned above and it is impossible to read into the will the contention of the learned Counsel that, though in terms it was a bequest, in fact, having regard to the preamble, it was only a recognition of the Zamindar's right to succeed to the estate. To accept the argument of the appellants, is to read into the will something which is not there. Obviously that cannot be done.

In the context of this contention strong reliance is placed upon a judgment of the Judicial Committee in *Kuar Shyam Pratap Singh* v. *Collector of Etawah*[1]. There, a holder of an impartible estate executed a will, the relevant part whereof read thus:

> "Today *K* has given his son *M* to me in adoption and I have taken him in adoption. After my death, my adopted son, shall be the "gaddi-nashin" and the owner of my entire movable and immovable property. After my death he shall, like myself have all the powers. *M* is yet a minor; therefore during his minority, my mother, *B* who was my guardian during my minority and who managed the entire estate very well, shall remain the guardian of my adopted son and shall manage the entire estate. I have, therefore, executed this will in a sound state of body and mind and after full deliberation."

On a construction of the said will the Judicial Committee held that taking the document as a whole the only operative part of it was the appointment of the guardian and the rest of it was narrative; and even on the assumption that the document could be construed as a gift of the property to *M*, their Lordships held that it was not effective to change its character from that of an impartible Raj governed by the rule of lineal primogeniture inasmuch as the testator had not broken the line of succession but on the contrary had given the property to the person who would succeed under the rule of lineal primogeniture. It is a well settled principle that a particular will shall be construed on its own terms. Except perhaps when the terms of two wills are exactly or practically the same, it is not possible even to derive any help from the construction of one will in construing the other will. The will we have extracted above differs in many material particulars from the will which is now under our scrutiny. That apart, the judgment of the Privy Council discloses that the parties who appeared before it were not interested to argue that the will contained a bequest. The following observation of the Privy Council makes that clear:

> "The first question which arises for decision on these consolidated appeals is whether the view taken by the High Court as to the construction and effect of the alleged will of Raja Hukam is correct. Upon this question the plaintiff and defendant have jointed forces in attacking the decision of the High Court, and no argument has been advanced before the Board in support of the decision, since Rani Baisni is not represented. Their Lordships can only decide the question as between the parties to this appeal."

Rani Baisni, the only party who was interested to contend that the finding of the High Court that there was a bequest in favour of the adopted son, was not represented before the Privy Council. Further, the terms of the will as extracted above did not contain any clause of clear disposition as in the will in the present appeal. The words used therein were susceptible of the construction accepted by the Judicial Committee, namely, that it was only an indication of the testator of the destination of the property in the event of his death. The decision, therefore, does not help the appellants. We, therefore, hold on a fair reading of the express words used in the will that the testator in clear and unambiguous terms made a bequest of the *A* Schedule property to the Zamindar, his only son.

The next argument of the learned Counsel for the appellants may be stated thus: Even if there was a bequest, on a true construction of the recitals in the will it should be held that the bequest was impressed with the incidents of an ancestral estate; that is to say, the legatee had to take it as a joint-family property in which his sons had an interest. To put it in other words, it is said that in the hands of the legatee the estate was a joint family impartible estate. We find it difficult to appreciate this argument. We have already held in dealing with the first point that under the will there was a clear bequest of the estate in favour of the Zamindar. We have also expressed the view that the preamble to the will had only described the factual position at the time the will was excuted and that it had no impact on the dispositive clause. The relevant clauses of the will making the bequest do not even remotely suggest the idea now canvassed before us. In view of the similarity of the clauses of disposition used in regard to different bequests, all of them should be construed in the same way. If so construed, it cannot be suggested that only in the case of the Zamindar a joint family estate was given, whereas in the case of others

1. (1946) 2 M.L.J. 235: A.I.R. 1946 P.C. 103, 105.

an absolute estate was given. In terms of the bequest, all of them got a similar estate, namely, an absolue estate in respect of the properties bequeathed to them.

Can it be said that the nature of the estate leads to the legal position that the legatee of the said estate only got a joint family estate, though under the express words of the bequest he got an absolute estate? As the law then stood, a holder of an ancestral impartible estate could alienate the same in favour of a third party by a deed *inter vivos* or under a will: in either case the alienee or legatee, as the case may be, got an absolute interest therein. The holder's son could not interdict the said alienation or bequest as he had no right by birth therein. The son had only a right to take the ancestral estate by survivorship in case the father died intestate. The exercise of the right by a father to alienate destroyed his son's right to take it by survivorship. If one right was exercised the other was lost. As the Zamindar got the estate as a legatee and not as a member of a joint Hindu family by right of survivorship, he got it absolutely in his own right under the terms of the will.

The question may be looked at from a different angle. The testator, as we have interpreted his will, conferred an absolute interest in the impartible estate on the Zamindar. How did that absolute estate become a joint family estate in the hands of the legatee? An absolute estate so conferred could have been limited by law operating on the bequest or by some inherent disqualification of the legatee to receive an absolute bequest. None of the said two circumstances existed in the present case.

The argument of the learned Counsel is presumably inspired by the judgment of this Court in *C. N. Arunachala Mudaliar* v. *C. A. Muruganatha Mudaliar*[1]. In that case a father made a gift of his self-acquired property to his son. It was contended that the property was an ancestral one in the hands of the son and, therefore, the later's sons had a right by birth in the said property. Rejecting that contention, Mukherjea, J., as he then was, speaking for the Court, observed :

"The property of the grandfather can normally vest in the father as ancestral property if and when the father inherits such property on the death of the grandfather or receives it, by partition, made by the grandfather himself during his lifetime. On both these occasions the grandfather's property comes to the father by virtue of the latter's legal right as a son of descendant of the former and consequently it becomes ancestral property in his hands. But when the father obtains the grandfather's property by way of gift, he receives it not because he is a son or has any legal right to such property but because his father chose to bestow a favour on him which he could have bestowed on any other person as well."

Later on the learned Judge expressed the same idea in a happier language thus :

"When however, he makes a gift which is only an act of bounty, he is unfettered in the exercise of his discretion by any rule or dictate of law."

On the said legal basis the learned Judge concluded thus :

"As the law is accepted and well settled that a Mitakshara father has complete powers of disposition over his self-acquired property, it must follow as a necessary consequence that the father is quite competent to provide expressly, when he makes a gift, either that the donee would take it exclusively for himself or that the gift would be for the benefit of his branch of the family."

On a construction of the document in that case, the learned Judge held that the gift was given exclusively to the donee and not for the benefit of his branch of the family. The said judgment decided two points, namely, (i) if a son gets the property of his father by inheritance or in partition, it being ancestral property under Hindu law, he becomes a co-owner with his son or sons; and (ii) the father can bequeath his self-acquired property to his son or sons absolutely or to the branch of his or their family. The first depends upon Hindu Law and the second on the nature of the bequest made. We have already held on a construction of the will in question that the father bequeathed the property, which he was entitled to do under law, absolutely to the Zamindar and not to the branch of his family. As the Zamindar obtained his father's property by way of bequest and not by virtue of his right as a son or descendant there is no scope for invoking Hindu Law to hold that in his hands the said property became the joint family property. We, therefore, hold that in the hands of the Zamindar the impartible estate was his self-acquired property.

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1. (1953) S.C.J. 707 : (1953) 2 M.L.J. 796 : (1954) S.C.R. 243, 251, 252, 254.

The next contention is that though under the will the Zamindar did not take the impartible estate as a joint family property it had become one by reason of section 4 of the Madras Impartible Estates Act II of 1904. The said Act came into force on 8th February, 1904. To appreciate this contention it will be necessary to know briefly the incidents of an impartible estate before the said Act was enacted. The law is so well settled that it does not call for copious citation or discussion. It would be enough if an important decision of the Privy Council, where all the incidents are collected, is noticed: that is the decision in *Shiba Prasad Singh* v. *Rani Prayag Kumari Debi*[1]. There, Sir Dinshah Mulla, speaking for the Board, after considering the case-law on the subject, summarised the legal position thus:

> "Impartibility is essentially a creature of custom. In the case of ordinary joint family property, the members of the family have (1) the right of partition; (2) the right to restrain alienations by the head of the family except for necessity; (3) the right of maintenance; and (4) the right of survivorship. The first of these rights cannot exist in the case of an impartible estate, though ancestral, from the very nature of the estate. The second is incompatible with the custom of impartibility, as laid down in *Sartaj Kuari's Case*[2] and the *First Pittapur Case*[3]; and so also the third, as held in the *Second Pittapur Case*[4]. To this extent the general law of the Mitakshara has been superseded by custom, and the impartible estate, though ancestral, is clothed with the incidents of self-acquired and separate property. But the right of survivorship is not inconsistent with the custom of impartibility. This right, therefore, still remains, and this is what was held in *Baijnath's Case*[5]. To this extent the estate still retains its character of joint family property, and its devolution is governed by the general Mitakshara Law applicable to such property. Though the other rights which a coparcener acquired by birth in joint family property no longer exist, the birth-right of the senior member to take by survivorship still remains. Nor is this right a mere succession similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate. It is a right which is capable of being renounced and surrendered. Such being their Lordship's view, it follows that in order to establish that a family governed by the Mitakshara in which there is an ancestral impartible estate has ceased to be joint, it is necessary to prove an intention, express or implied, on the part of the junior members of the family to renounce their right of succession to the estate."

This is a full statement of the law on the subject. Though some observations made by the Privy Council in a later decision in *Collector of Gorakhpur* v. *Ram Sundar Mal*[6] threw some doubt on some aspects of the legal position stated supra, the subsequent decisions of the Privy Council clarified the position and reaffirmed the law as enunciated in *Shiba Prasad Singh's Case*[1]: See *Commissioner of Income-tax, Punjab* v. *Krishna Kishore*.[7] It is, therefore, clear that an impartible estate could be an ancestral property or a self-acquired property of the holder of the said estate. Even if it was an ancestral estate, the sons of the holder had no right to restrain alienations by the head of the family even without necessity, for the said right was incompatible with the custom of impartibility as laid down in *Sartaj Kuari's Case*[2], and the First *Pittapur Case*[3]. The result was that as the law then stood the head of an impartible estate could alienate the property, whether it was ancestral or self-acquired. Presumably to preserve impartible estates, the Madras Impartible Estates Act II of 1904 was passed and it became law on 8th February, 1904. The Long Title of the Act reads:

> "An Act to declare that certain estates are impartible and that the proprietors of such estates cannot exercise unrestricted powers of alienation in respect thereof."

"Impartible estate" is defined to mean an estate descendible to a single heir and subject to the other incidents of impartible estates in Southern India. Section 3 says that the estates included in the Schedule shall be deemed to be impartible estates. In the Schedule Seithur Estate is included as one of the estates to which the Madras Act II of 1904 applied. Section 4 on which reliance is placed by the learned Counsel for the appellants reads thus:

> "(1) The proprietor of an impartible estate shall be incapable of alienating or binding by his debts such estate or any part thereof beyond his own lifetime unless the alienation shall be made, or the debt incurred, under circumstances which would entitle the managing member of a joint Hindu family,

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1. (1932) L.R. 59 I.A. 331, 345 : 63 M.L.J. 196 : A.I.R. 1932 P.C. 216.
2. (1888) L.R. 15 I.A. 5.
3. (1899) L.R. 26 I.A. 83 : I.L.R. 22 Mad. 383 : 9 M.L.J. (Sup.) 1.
4. (1918) L.R. 45 I.A. 148 : I.L.R. 41 Mad. 778 : 35 M.L.J. 392.
5. (1921) L.R. 48 I.A. 195 : 40 M.L.J. 387.
6. (1934) L.R. 61 I.A. 286 : 67 M.L.J. 274 : I.L.R. 56 All. 468.
7. (1941) I.L.R. 23 Lah. 1 : L.R. 68 I.A. 155 : (1941) 2 M.L.J. 972.

not being the father or grandfather of the other coparceners, to make an alienation of the joint property, or to incur a debt, binding on the shares of the other coparceners independently of their consent."

This sub-section in terms limits the unrestricted power to incur debts or alienate properties possessed by an impartible estate-holder in respect of his estate. The limits of his power are defined by reference to the power of a managing member of a joint Hindu family, not being the father or grandfather of the other coparceners, to make an alienation of the joint family property or to incur a debt. His power in regard to alienations and debts is equated to that of a manager of a joint Hindu family. While an impartible estate-holder before the Act could alienate the estate or a part thereof or incur debts binding on the estate without any restrictions on his power, after the Act he can only do so under the circumstances where a manager of a Hindu joint family can do so. But it is not possible to hold that the sub-section by its own force converted a self-acquired impartible estate before the Act into a joint family estate thereafter. The words of the sub-section do not bear any such contention. If so, it follows that though the Seithur Zamin was an impartible estate under Madras Act II of 1904, it continued to be a self-acquired property of the Zamindar.

It is then contended that the Zamindar had voluntarily thrown the impartible estate into the common stock with the intention of abandoning all his separate claims upon it. Mr. Vedantachari, learned Counsel for the Zamindar, argued that there was no scope for the application of the said doctrine of blending in the case of an impartible estate, as the other members of the family had no present interest in the said property. It is not necessary to express our opinion on this question, as the Tribunal as well as the High Court, on a consideration of the evidence placed before them, came to the conclusion that the evidence adduced for that purpose was wholly insufficient to sustain a finding of blending. The finding is one of fact and no exceptional circumstances have been placed before us to make us interfere with that finding.

If the impartible estate was the self-acquired property of the Zamindar, the next question is wheter the appellants would be entitled to share in the compensation under the provisions of the Act. The Act and the Rules made thereunder provide for the deposit of the compensation by the State with the Tribunal, for a procedure to enable the claimants to apply to the said Tribunal for the compensation and for the manner of ascertaining and distributing the compensation among them in accordance with the value of their respective interests in the estate. The material sections then proceed to state thus :

Section 44. (2) The value of those interests shall be ascertained—

(*a*) in the case of the impartible estates referred to in section 45, in accordance with the provisions contained in that section and in such rules, not inconsistent with that section, as may be made by the Government in this behalf; and

(*b*) in the case of other estates, in accordance with such rules as may be made by the Government in this behalf.

Section 45. (1) In the case of an impartible estate which had to be regarded as the property of a joint Hindu family for the purpose of ascertaining the succession thereto immediately before the notified date, the following provisions shall apply.

(2) The Tribunal shall determine the aggregate compensation payable to all the following persons, considered as a single group :—

(*a*) the principal landholder and his legitimate sons, grandsons and great-grandsons in the male line living or in the womb on the notified date, including sons, grandsons and great-grandsons adopted before such date (who are hereinafter called "sharers") ;

RULES MADE IN EXERCISE OF THE POWERS CONFERRED BY SECTION 67 READ WITH SECTION 44 (2) (*b*) OF THE ACT.

Rule 1. In the case of an estate not being an impartible estate governed by section 45, the value of the respective interests in the estate of the principal landholder and the other persons mentioned in section 44 (1) shall be ascertained.

Rule 4. (1) In the case of (i) a partible estate other than that specified in rule (3), or (ii) an impartible estate not governed by section 45 the Tribunal shall determine the aggregate compensation payable to all the following persons considered as a single group :—

(i) the persons, who immediately before the notified date, owned the estate .... ".

The question is whether section 45 (1) of the Act applied to the Estate, in which case the persons mentioned in section 45 (2), *i.e.*, the appellants and the Zamindar, would get the compensation, or whether rule 4 (1) would apply, in which case the persons mentioned therein *i.e*, the persons who immediately before the notified date had owned the estate, would get the compensation. Learned Counsel for the appellants contends that the impartible estate mentioned in section 45 (1) is the same as that described in section (1) of the Impartible Estates Act II of 1904. We do not see any justification for this contention. Section 45 (1) only gives the description of an ancestral impartible estate as evolved by judicial decisions. As noticed earlier it has been held by the Judicial Committee that an impartible estate, though ancestral, is clothed with the incidents of a self-acquired and separate property, but the right of survivorship alone still remains and to that extent the estate still retains the character of a joint family property. Section 45 (1) of the Act in terms succinctly describes an ancestral impartible estate in the light of the said decisions. As we have held that Seithur Zamin is not an ancestral impartible estate in the hands of the Zamindar, it is outside the scope of section 45 of the Act. It follows that it will be governed by rules 1 and 4 (1) of the Rules made under the Act. It is not disputed that if rule 4 (1) applies, the appellants are out of Court, for the Zamindar alone owned the estate before the notified date.

In our view, the judgment of the High Court is correct. The appeal fails and is dismissed with costs.

K.S. *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—K. SUBBA RAO, J. C. SHAH AND R. S. BACHAWAT, JJ.

Gopisetti Venkatratnam and others .. *Appellants**

v.

Vijayawada Municipality and another .. *Respondents.*

Electricity Act (IX of 1910), *section* 21 (2)—*Agreement between licensee and consumer for supply of energy —Agreement for payment at " Current Official Scale of Rates "—Licensee a Municipality enhancing the rates by a resolution—Validity—If enhancement of rate alteration or amendment of conditions for supply of energy to consumer —Sanction of Government if essential for validity of alteration of rates.*

The agreement between a licensee to supply electricity and a consumer provided *inter alia* that the " consumer shall pay to the licensee for all electrical energy so supplied at the rates and in accordance with the terms, given in the licensee's Current Official Scale of Rates." The licensee a Municipality by a resolution enhanced the rates and the consumer questioned the legality and validity of the enhancement.

Held : On a reasonable construction of the ambiguous expression " current " having regard to the entire document and the surrounding circumstances the words " Current Official Scale of Rates" in the agreement mean the Official Scale of Rates current or prevalent from time to time during the currency of the agreement. The consumer was liable to pay the enhanced rates. If the term to pay the rates that were fixed from time to time by the Municipality (licensee) was a condition within the meaning of section 21 (2) of the Electricity Act, there was no change at all in that condition, for the change in the rates was not in derogation of the condition but in terms of it. Therefore no sanction of the State Government under section 21 of the Electricity Act was necessary for enhancing the rates under the section.

Appeal by Special Leave from the Judgment and Decree dated 10th October, 1961 of the Andhra Pradesh High Court in Second Appeal No. 872 of 1958.†

A. V. Viswanatha Sastri, Senior Advocate (*K. Rajendra Chaudhuri* and *K. R. Chaudhuri*, Advocates, with him), for Appellants.

S. V. Gupte, Solicitor-General, (*T. Satyanarayana*, Advocate, with him), for Respondent No. 1.

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* C.A. No. 69 of 1964. 5th March, 1965.

† A.I.R. 1962 A.P. 342.

T. V. R. Tatachari and *B. R. G. K. Achar*, Advocates, for Respondent No. 2.

The Judgment of the Court was delivered by

Subba Rao, J.—On 22nd November, 1927, the Government of Madras, in exercise of its powers under section 3 (1) of the Indian Electricty Act, (IX of 1910), hereinafter called the Act, issued a licence to the Bezwada (now Vijayawada) Muncipal Council for the supply of electric energy within the municipal limits of Bezwada at rates not exceeding the maximum charges given in the third annexure to the said licence. The appellants, who are some of the consumers of electric energy for domestic and industrial purposes, entered into agreements with the licensee for the supply of electric energy to them for domestic, industrial and other purposes, agreeing to pay the current official scale of rates. On 13th December, 1940, the Municipality passed a resolution bringing into force new rates for the supply of electric energy from 1st April, 1940. The consumers paid the rates so fixed till the year 1956. On 30th April, 1956, the Municipal Council passed another resolution enhancing the rates from 1st April, 1956. The appellants filed a representative suit against the Vijayawada Municipality in the Court of the District Munsif, Vijayawada, for a declaration that the said resolution dated 30th April, 1956, passed by the Municipal Council was illegal, invalid and unenforceable and for an injunction restraining the said Muncipality from collecting charges from the consumers of electric energy in the licensee's area at the new revised rates in pursuance of the impugned resolution. The learned District Munsif held that the demand of enhanced rate was legal and valid and dismissed the suit. On appeal, the learned Subordinate Judge held that the levy from the date of the said resolution was good, but it could not be given retrospective operation. He further held that the claim for duty at half an anna per unit was invalid. In the result he modified the decree of the District Munsif. On a further appeal, a Division Bench of the Andhra Pradesh High Court confirmed the decree of the Subordinate Judge. By Special Leave the present appeal has been filed in this Court.

Mr. A. V. Viswanatha Sastri, learned Counsel for the appellants raised before us the following two contentions : (1) The rates agreed upon between the consumers and the Municipality cannot be unilaterally altered and increased by the Municipality to the prejudice of the consumers and, therefore, the said resolution dated 30th April, 1956, was invalid and unenforceable ; and (2) as the said resolution was passed without obtaining the previous sanction of the State Government under section 21 (2) of the Act, it was void for that reason also.

The first contention turns upon the relevant clauses of the agreement entered into between the Municipal Council and the consumers. Exhibit B-4 is one such agreement dated 27th May, 1932, between the Muncipality and one of the appellants herein. The material clauses of the agreement read :

Para. IV. The consumer shall pay to the licensee for all electrical energy so supplied at the rates and in accordance with the terms, given in the licensee's Current Official Scale of Rates and the signing of this Agreement is held to imply concurrence in the terms of the said scales of rates:

Provided that the minimum rates as specified therein shall be paid irrespective of whether energy to the extent has been consumed or not.

Para. V.—A consumer under this Agreement is required to state (see Schedule) under which of the rates set out in the licensee's Official Scale of energy rates, he desires to be charged.

Para. X.—This Agreement shall be read and construed as subject in all respects to the provisions of the Bezwada Municipal Electric Licence, 1927, and to the provisions of the Indian Electricity Act, 1910, and of any modification or re-enactment thereof for the time being in force thereunder so far as the same respectively may be applicable. The supply of electrical energy under this agreement is subject to following among other provisions of law, namely :—

* * * * *

THE SCHEDULE ABOVE REFERRED TO

(2) Purposes to which the supply is to be given, and in the case of domestic supply under which rate to be charged, as referred to in paragraph V :

(a) (Supply) *Domestic Purposes.*

(b) (Rate) *Rs.* 0-6-0 *per unit.*

(3) Maximum electrical power required by the consumer : 0-54 *K.W.*

(4) Minimum monthly charge : *Rs.* 2-8-0 *in accordance with* (*a*) *class rate in the Schedule of rates.*

The Schedule of rates mentioned in this agreement presumably refers to scale of rates fixed by the resolution of the Muncipality. The conflicting arguments centre on the question whether the words "current official scale of rates" in Paragraph IV relate to the scale of rates current on the date when the agreement was entered into or refer to the scale of rates current from time to time in accordance with the resolution passed by the Municipality. The expression " current " means " vogue or prevalent "; and " current rate " may mean the rate obtaining at a particular time or at a future time or from time to time. The term goes well with the present, future and recurrent. It is capable of different meanings depending upon the context or setting in which it appears. As the meaning of the word is ambiguous, it is legitimate, in order to ascertain its true meaning, not only to study the document as a whole but also to ascertain its meaning from the circumstances whereunder the said agreement came into existence. Under Paragraph X of the agreement the said agreement shall be subject to the provisions of the licence and the provisions of the Indian Electricity Act, 1910, that is to say the said provisions are incorporated by reference into this agreement. Under the licence the licensee is precluded from charging rates higher than those prescribed thereunder. On 1st April, 1940, the Electricity Department of the Vijayawada Municipality prepared a document styled as " Conditions and Rates of Supply ". It does not contain any statutory rules, but only administrative directions in regard to providing, *inter alia*, for the method of entering into agreements and for charging rates for the energy supplied. This embodies the administrative practice of the Muncipality in the matter of charging rates for the energy supplied. Paragraph 15 thereof, under the heading " *Method of charging for current* ", reads :

" The price and method of charging for current supplied shall be such as may from time to time be fixed by the licensee in accordance with the provisions of the Act and of his licence, or such as may be made subject of special agreement between the consumers and the licensee; "

This makes a distinction between the official rate and the contractual rate. The official rate is that fixed by the licensee from time to time and the contractual rate is that fixed by special agreement between the parties. It may be assumed that this dual method is followed by the Muncipality in the matter of entering into agreements. The form of application prescribed for the supply of electric energy contains the following clause :

" I agree to pay for the said energy, service connection and other dues including the deposit of such security as may be demanded in accordance with the scale of rates and the rules of the licence. "

The scale of rates in the context means the official scale of rates that may be fixed by the Muncipality. When an application is filed an obligation is imposed under section 22 of the Act on the licencee to supply energy, except in so far as is otherwise provided by the terms and conditions of the licence, on the same terms as those on which any other person in the same area is entitled in similar circumstances to corresponding supply. Section 23 of the Act says that a licensee shall not, in making any agreement for the supply of energy, show undue preference to any person. The combined operation of these provisions is that the licensee cannot discriminate between the applicants in the matter, among others, of rates chargeable for the energy supplied. Unless the Municipality enters into an agreement with a consumer enabling it to charge him at a rate fixed by it from time to time, it would be very difficult for the Muncipality to maintain equality of treatment between the consumers in the matter of rates. To illustrate, if under certain agreement a rate obtaining at a particular date is agreed upon and the rate is binding on the Municipality even if it is raised later on, the Muncipality may be guilty of discrimination which it is asked to avoid by statute if it charges other consumers at a higher rate. This difficulty can be avoided if there is a term in the agreement executed by every consumer that he will pay the official rate fixed by the Muncipality from time to time subject to the maximum fixed by the licence. That apart, a public body like the Municipality in supplying energy to different

consumers cannot run the risk of incurring loss by agreeing to fixed rates, for the Government may increase the licence fee, as it has done in the present case, or there may be a rise in the cost of distribution. On the other hand, if the term in the agreement is flexible to meet the said eventualities, the maintenance of continuous supply of electric energy may be assured without any loss to the public body. The circumstances obtaining at the time when the agreements between the consumers and the municipality were entered into were these: The licensee had power to fix the rates subject to the maximum prescribed by the Government. The administrative directions provided for charging for the current supplied at rates that may be fixed from time to time. The Muncipality was in practice fixing the rates from time to time having regard to the relevant circumstances. The said rates fixed by the Muncipality from time to time were the " official scale of rates ". The consumers applied to the Muncipality for supply of energy, agreeing to pay for the energy supplied at the scale of rates fixed by the Muncipality.

With this background if we look at Paragraphs IV and V of Exhibit B-4 the meaning of the expression " current official scale of rates " will be clear. Paragraph IV speaks of "current official scale of rates" whereas Paragraph V mentions "official scale of energy rates". These two paragraphs bring out the distinction between the official scale of rates and the official scale of energy rates : the former refers to the scale of rates maintained by the Municipality as modified from time to time by appropriate resolutions, and the latter refers to the different rates payable in respect of energy supplied for different purposes. Under Paragraph IV the consumer specifically agreed to abide by the official scale of rates. If the intention of the parties is that the consumer shall pay only the scale of energy rates obtaining at the time the agreement is entered into, there is no necessity for this specific agreement, for Paragraph V serves that purpose. On the other hand, the said express condition and the use of the word "current" make it clear that the consumer agrees to pay at the official scale of rates current from time to time. The adjective " current " will become a surplusage, if the intention is to pay the rates obtaining at the time the agreement is entered into, for the agreement itself gives the existing rates. The use of the adjective " current " emphasises the fact that the official scale of rates is not the existing rates, but the scale of rates current from time to time. We have, therefore, on a reasonable construction of the ambiguous expression "current" having regard to the entire document and the surrounding circumstances, come to the conclusion that the words "current official scale of rates" in Paragraph IV of the agreement mean the official scale of rates current or prevalent from time to time during the currency of the agreement. If so, it follows that the appellants were under a contractual liability to pay the enhanced rates covered by the impugned resolution.

The next question turns upon section 21 (2) of the Act, which, as it then stood, read :

" Subject to the provisions of sub-section (1), a licensee may, with the previous sanction of the State Government given after consulting the local authority, make conditions not inconsistent with this Act or with his licence or with any Rules made under this Act, to regulate his relations with persons who are or intend to become consumers, and may with the like sanction given after the like consultation add to or alter or amend any such conditions ; and any conditions made by a licensee without such sanction shall be null and void."

Under this sub-section the licensee cannot make conditions to regulate his relations with the consumers or amend any such conditions without the sanction of the State Government. Mr. Viswanatha Sastri argued that to enhance the rates was to alter a condition within the meaning of sub-section (2) of section 21 of the Act and as admittedly the sanction of the State Government was not obtained before such alteration, the said resolution was void. The learned Solicitor-General contended that section 21 (2) of the Act was a general provision relating to conditions, whereas section 23 thereof was a specific provision in regard to fixing of rates and that section 23 would, therefore, prevail over section 21 and that section 23 did not prescribe the sanction of the Government as a condition precedent for fixing the rates. Mr. Tatachari, while supporting this argument, added that on the interpretation of Paragraph IV of the agreement suggested by the respondents there was no alteration in the conditions at all and, therefore, there was no scope for invoking section 21 of

the Act. It is not necessary to express our opinion in this case on the question whether section 23 excludes the operation of section 21 (2) of the Act in the matter of fixation of rates, for we are satisfied that there is no alteration of any condition of the agreement within the meaning of section 21 (1) thereof. We have held that under Paragraph IV of the agreement that was entered into between the consumers and the licensee, the consumers agreed to pay the rates that were fixed by the Municipality from time to time. If the said term was a condition within the meaning of section 21 (2) of the Act, there was no change at all in that condition, for the change in the rates was not in derogation of the condition but in terms of it. To state it differently, the same condition embodied in Paragraph IV of the agreement continued to operate between the parties even after the rates were enhanced under the impugned resolution. Therefore, no sanction of the State Government was necessary for enhancing the rates.

No other point was raised before us. In the result, the appeal fails and is dismissed with one set of costs.

K.S. *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, J.C. SHAH AND R.S. BACHAWAT, JJ.

Karpagathachi and others .. *Appellants**

v.

Nagarathinathachi .. *Respondent.*

Hindu Law (as in 1924)—Co-widows succeeding to properties of husband—Nature of estate—Partition arrangement excluding right of survivorship—If repugnant to section 6 (a) of Transfer of Property Act (IV of 1882)—Partition lists—Registration—If essential—Oral partition—Validity.

Under the Hindu Law as it stood in 1924, two widows inheriting their husband's properties took together one estate as joint tenants with rights of survivorship and equal beneficial enjoyment. They were entitled to enforce a partition of those properties so that each could separately possess and enjoy the portion allotted to her. Neither could without the consent of the other enforce an absolute partition of the estate so as to destroy the right of survivorship. But by mutual consent they could enter into any arrangement regarding their respective rights in the properties during the continuance of the widows estate, and could absolutely divide the properties, so as to preclude the right of survivorship of each of the portion allotted to the other. Such an arrangement was not repugnant to section 6 (a) of the Transfer of Property Act, 1882. The interest of each widow in the properties inherited by her was property, and this property together with the incidental right of survivorship could be lawfully transferred. Section 6 (a) of the Transfer of Property Act prohibits the transfer of the bare chance of the surviving widow taking the entire estate as the next heir of her husband on the death of the co-widow, it does not prohibit the transfer by the widow of her present interest in the properties inherited by her together with the incidental right of survivorship. The widows were competent to partition the properties and allot separate portions to each, and incidental to such allotment, each could agree to relinquish her right of survivorship in the portion allotted to the other.

Such partition may be effected orally. Partition lists were merely evidence of oral partition and where no objection to their admissibility for want of registration was raised in the trial Court, the objection cannot be allowed to be raised in the High Court in the appeal.

In the instant case the lists showed that each widow was to " take and enjoy ". (*adaintha anubavitha*) and there were no words indicating absolute partition and relinquishment of the right of survivorship of the other widow. Accordingly the daughter cannot succeed to the share of one of the widows on her death. "

Appeal from the Judgment and Decree dated the 12th January, 1962 of the Madras High Court in Appeal Suit No. 292 of 1958.†

A. V. Viswanatha Sastri, Senior Advocate, (*V. S. Ramaswami Iyengar* and *R. Thiagarajan*, Advocates, with him), for Appellants.

S. V. Gupte, Solicitor-General of India, (*R. Ganapathy Iyer*, Advocate with him), for Respondent.

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* C.A. No. 998 of 1963. 10th March, 1965.

† (1962) 2 M.L.J. 312.

The Judgment of the Court was delivered by

Bachawat, J.—One Sivasubramania Pillai died in the year 1924 leaving him surviving his mother, two widows, Thialaiachi and Karpagathachi, and a daughter, Nagarathinathachi (respondent herein) born of Thialaiachi. The two widows inherited the properties left by Sivasubramania. In July, 1927, they divided the bulk of the properties and each entered into separate possession and enjoyment of the properties allotted to her. The partition is evidenced by two partition lists called partition deeds, Exhibits A-1 and B-45 dated 14th July, 1927 and signed by both of them. Under this partition, two *velis* of land were set apart for the maintenance of Sivasubramania's mother, to be enjoyed by her during her lifetime, and on her death, to be taken and enjoyed by the two widows in separate portions as mentioned in the partition lists. On 26th August, 1954, Thialaiachi died, and upon her death, the respondent took possession of the properties allotted to Thialaiachi under the partition of July, 1927. On 8th December, 1954, Karpagathachi instituted against the respondent the suit, out of which this appeal arises, claiming possession of the suit properties. The respondent resisted the suit claiming that under the partition each widow gave up her right of survivorship in respect of the properties allotted to the other, and consequently on the death of Thailaiachi, the respondent as her daughter was entitled to take her share as her heir and to enjoy the same during the life of Karpaghathachi. By his judgment dated 18th August, 1958, the District Judge, East Thanjavur, rejected the defendant's contention, and held that the division between the two widows was for convenience of enjoyment only, and decreed the suit in respect of the properties held by Thialaiachi under the partition of July, 1927. On appeal, the Madras High Court by its judgment dated 12th January, 1962 held that under the partition each widow gave up her life interest in the properties allotted to the other and consequently Karpagathachi was not entitled to recover possession of the properties alloted to Thialaiachi, set aside the decree of the District Judge, and dismissed the suit. Karpagathachi and several other persons impleaded as party respondents in the appeal before the High Court now appeal to this Court under a certificate granted by the High Court under Article 133 of the Constitution.

Mr. Viswanatha Sastry appearing on behalf of the appellants contends that (1) the right of survivorship of each widow in respect of her husband's estate is the chance of the surviving widow to take the entire estate of her husband on the death of the co-widow, and in view of section 6 (*a*) of the Transfer of Property Act, 1882, the widows were not competent to enter into an arrangement transferring or relinquishing their right of survivorship; (2) the partition lists, Exhibits A-1 and B-45 not being registered, are not admissible in evidence; (3) the partition between the widows was for convenience of enjoyment only and the respondent has failed to establish that each co-widow gave up her right of survivorship in respect of the properties allotted to the other. The learned Solicitor-General appearing on behalf of the respondent disputed these contentions.

We are of opinion that the first contention of Mr. Viswanatha Sastry should be rejected. Under the Hindu law as it stood in 1924, two widows inheriting their husband's properties took together one estate as joint tenants with rights of survivorship and equal beneficial enjoyment. They were entitled to enforce a partition of those properties so that each could separately possess and enjoy the portion allotted to her, see *Bhugawan Deen Doobey* v. *Myna Baee*[1]; *Gauri Nath Kakaji* v. *Gaya Kuar*[2]. Neither could without the consent of the other enforce an absolute partition of the estate so as to destroy the right of survivorship, see *Commissioner of Income-tax* v. *Smt. Indira Balakrishna*[3]. But by mutual consent they could enter into any arrangement regarding their respective rights in the properties during the continuance of the widow's estate, and could absolutely divide the properties, so as to preclude the right

1. (1867) 11 M.I.A. 487.
2. (1928) 55 M.L.J. 339 : L.R. 55 I.A. 399.
3. (1960) 3 S.C.R. 513, 517 : (1961) S.C.J. 153.

of survivorship of each to the portion allotted to the other. See *Ramakkal* v. *Ramasami Naickan*[1], *Suddalai Ammal* v. *Gomathi Ammal*[2]. Likewise, two daughters succeeding to their father's estate as joint tenants with right of survivorship could enter into a similar arrangement. See *Kailash Chandra Chuckerbutty* v. *Kashi Chandra Chuckerbutty*[3], *Subbammal* v. *Lakshmana Iyer*,[4] *Ammani Ammal* v. *Periasami Udayan*[5]. Such an arrangement was not repugnant to section 6 (*a*) of the Transfer of Property Act, 1882. The interest of each widow in the properties inherited by her was property and this property together with the incidental right of survivorship could be lawfully transferred. Section 6 (*a*) of the Transfer of Property Act prohibits the transfer of the bare chance of the surviving widow taking the entire estate as the next heir of her husband on the death of the co-widow, but it does not prohibit the transfer by the widow of her present interest in the properties inherited by her together with the incidental right of survivorship. The widows were competent to partition the properties and allot separate portions to each, and incidental to such an allotment, each could agree to relinquish her right of survivorship in the portion allotted to the other. The first contention of Mr. Viswanatha Sastry must be rejected.

The second contention of Mr. Viswanatha Sastry must also be rejected. A partition may be effected orally. By an oral partition, the two widows could adjust their diverse rights in the entire estate, and as part of this arrangement, each could orally agree to relinquish her right of survivorship to the portion allotted to the other. In the trial Court, the suit was tried on the footing that the partition was oral, and that the two partition lists were merely pieces of evidence of the oral partition, and no objection was raised with regard to their admissibility in evidence. In the High Court, the appellants raised the contention for the first time that the two partition lists were required to be registered. The point could not be decided without further investigation into questions of fact, and in the circumstances, the High Court rightly ruled that this new contention could not be raised for the first time in appeal. We think that the appellants ought not to be allowed to raise this new contention.

We think that the third contention of Mr. Viswanatha Sastry is sound and should be accepted. Mere partition of the estate between the two widows does not destroy the right of survivorship of each to the properties allotted to the other. The party who asserts that there was an arrangement by which the widows agree to relinquish the right of survivorship must establish this arrangement by clear and cogent evidence. The respondent has failed to discharge this onus. It is common case that the partition is evidenced by Exhibits A-1 and B-45. Exhibit B-45 is the list showing the properties allotted to Thialaiachi. The relevant portion of Exhibit B-45 reads:

> "In accordance with the chit cast, Thaiyalaiachi, wife of Sivasubramania Pillai, residing at Karuppur, shall take the nanja, punja, house and ground, cattle-shed, cattle, pathway for men, cattle and cart and shed where dried dung cakes are stored mentioned in the list and shall pay the Government kist for the aforesaid properties from the current fasli 1337 and enjoy them."

Exhibit A-1 showing the properties allotted to Karpagathachi contains similar words. Now, the two lists show that each widow is to "take and enjoy" the properties allotted to her. The corresponding Tamil words are "*adainthu anubavithu*." These words do not either expressly or by necessary intendment exclude the right of survivorship of the other widow. The Tamil words "*Sarva Swatantra Badyamayum*" and "*Santhathi pravesamayum*" and other words indicating relinquishment of the right of survivorship are conspicuous by their absence. The words used in the two partition lists are wholly insufficient to show that the two widows relinquished their right of survivorship *inter se*. The fact that two separate partition lists were drawn up and each was signed by the two widows does not carry the matter any further. The two partition lists show that the two *velis* of land kept separately for the maintenance of the mother-in-law were to be divided by metes and bounds.

1. (1899) 9 M.L.J. 101 : I.L.R. 22 Mad. 522.
2. (1912) 23 M.L.J. 355.
3. (1897) I.L.R. 24 Cal. 339.
4. (1914) 26 M.L.J. 479.
5. (1923) 45 M.L.J. 1 : A.I.R. 1924 Mad. 75.

on her death between the two widows. The division of the two *velis* on the death of the mother-in-law was agreed upon to avoid future disputes. The fact that Thialaiachi had a daughter and was older than Karpagathachi by 20 years does not show that Karpagathachi must have agreed that Thialaiachi's daughter should enjoy the properties allotted to Thialaichai after her death. After the partition, the pattas in respect of all the lands continued to be in the joint names of both the widows. If there was an absolute partition between the two widows, it is not explained why there was no separate mutation in the name of each widow in respect of the lands allotted to her.

The deeds executed by Thialaiachi, Exhibits B-3, B-4, B-6, B-7 and B-8 to B-43 recite the partition, but they do not use words indicating that there was an absolute partition. The sale deeds, Exhibits A-3, A-4, and A-6 executed by both the widows are in respect of undivided properties and throw no light on the question at issue. The evidence on the record does not show clearly whether the sale deed, Exhibit B-44, executed by both the widows relates to undivided properties, or whether it relates to properties separately allotted to Thialaiachi. From time to time, Thialaiachi executed three wills, Exhibits B-1, B-2 and A-5 giving to the legatees and particularly the respondent certain properties absolutely with full powers of alienation. The first two wills, Exhibits B-1 and B-2, refer separately to Thialaiachi's separate properties and to the properties obtained by her on partition. The recitals in the two wills do not indicate that Thialaiachi obtained her husband's properties on partition with absolute rights. The third will, Exhibit A-5, does not purport to dispose of specifically the properties obtained by her on partition. Karpagathachi knew that Thialaiachi had executed the wills, but it is not shown that she knew of the contents of the wills. By Exhibits A-2, both Thialaiachi and Karpagathachi made a free gift of some of the properties allotted to Thialaiachi. D.W. 1 is unable to explain why Thialaiachi joined in this deed. By sale deed, Exhibit B-5, Thialaiachi sold absolutely some of the properties allotted to her and a notice, Exhibit A-22, regarding the proposed transfer of the *patta* in the name of the vendee was served upon Karpagathachi. It is not clear if the *patta* was actually transferred in the name of the vendee. The explanation of Karpagathachi that she protested against the transfer and ultimately received one half of the sale price has not been believed. But assuming that Karpagathachi did not object to the transfer, this single circumstance does not establish that at the time of the partition, she had agreed to give up her right of survivorship in respect of the properties allotted to Thialaiachi.

Karpagathachi (P.W. 1) denied that there was an absolute partition. She was not shaken in cross-examination. Nataraja Pillai (P.W. 2) said that there was no talk that each should take the properties absolutely and it was agreed that each would enjoy separately. We find nothing in the evidence of P.W. 2 to show that the widows agreed to partition the properties absolutely so as to destroy the right of survivorship. Manickam Pillai (D.W. 1) said that at the time of the partition, Thialaiachi said that she had a daughter and if what was allotted for her share was given to her absolutely she would agree to the partition and Karpagathachi also wanted to have absolute rights. The District Judge rightly rejected the evidence of D.W. 1. The partition lists were drawn up after consulting lawyers. D.W. 1 is unable to explain why words indicating absolute partition were not used in the partition lists. D.W. 1 had been in management of the properties of the respondent, yet he falsely denied this fact. He had intimate dealings with Thialaiachi and the respondent. On a meticulous examination of the oral and documentary evidence, the learned District Judge rejected the respondent's case that the widows had orally agreed to relinquish their right of survivorship. We think that this finding is correct, and the High Court was in error in reversing this finding.

In the result, the appeal is allowed, the decree and judgment passed by the High Court are set aside and those of the trial Judge restored. In all the circumstances, we direct that the parties will pay and bear their own costs throughout, in this Court and also in the Courts below.

K.S. — *Appeal allowed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate/Original Jurisdiction.)

PRESENT :—K. SUBBA RAO, K. N. WANCHOO, M. HIDAYATULLAH, J. C. SHAH AND S. M. SIKRI, JJ.

Prabhakar Rao H. Mawle .. *Appellant/Petitioner**

v.

The State of Andhra Pradesh .. *Respondent.*

Madras Vexatious Litigation (Prevention) Act (VIII of 1949)—Constitutional validity—If offends Articles 14 and 19 of Constitution of India (1950)—Applicability to Telangana Area of Andhra Pradesh—States Reorganisation Act (XXXVII of 1956), section 119—Effect—Andhra State Act (XXX of 1953).

Madras Vexatious Litigation (Prevention) Act, 1949 has received the assent of the Governor General and the subject of the legislation was covered by Entries 2 of List II and 2 and 4 of List III of the Government of India Act, 1935. The Act subserves public interest and the restraint that it creates is designed to promote public good. The Act does not prevent a person declared to be habitual litigant from bringing genuine and *bona fide* actions. It only seeks to cut short attempts to be vexatious. The Act cannot be described as unconstitutional or offending either Article 19 or Article 14 of the Constitution of India (1950).

But the Act is not operative in the Telangana Area of the new State of Andhra Pradesh. The Act has not been extended to the Telangana Area and till extended section 119 of the States Reorganisation Act expressly prohibits an extension to the Telengana Area by judicial construction. Further there being no Presidency Town as such in the new State of Andhra Pradesh section 2 (1) (i) of Madras Act VIII of 1949 can no longer apply without a proper amendment. The Act is unworkable in the State of Andhra Pradesh without substantial modifications.

All laws are intended to operate territorially and no Provincial Legislature in India possessed extra-territorial jurisdiction. If new territories are to be governed by the Act it must be extended to the new territories and this is the obvious result of section 119 of the States Reorganisation Act.

Per *Shah, J.*—The Parliament having by Andhra State Act (XXX of 1953) invested the High Court of Andhra with authority to exercise *all jurisdiction* which the High Court of Madras possessed within the territories of the State of Andhra as constituted and thereafter having by section 65 (i) (a) of Act XXXVII of 1956 extended the exercise of that authority over the entire territory of Andhra Pradesh it cannot be said that in respect of the jurisdiction conferred by the Madras Vexatious Litigation (Prevention) Act the High Court was incompetent to pass an order against a litigant in the Telangana Area of Andhra Pradesh. But assuming that the appellant had in instituting and prosecuting cases which he had instituted shown less objectivity and more enthusiasm than a lawyer may in similar cases show, and had attempted to obtain benefit of what he thought were lacunae in the law, imposition of a blanket restriction against him of the nature imposed by the High Court may not seem to be warranted.

Appeal by Special Leave from the Judgment and Order dated 21st April, 1961 of the Andhra Pradesh High Court in C.M.P. No. 239 of 1960† and petition under Article 32 of the Constitution of India for enforcement of the Fundamental Rights, etc.

Appellant / Petitioner in person.

K. R. Chaudhuri and *B. R. G. K. Achar*, Advocates, for Respondent (In C.A. No. 900 of 1963 and Writ Petition No. 146 of 1961).

The Court delivered the following Judgments :—

Hidayatullah, J. (on behalf of *Subba Rao, J.*, *Wanchoo, J.*, himself and *Sikri, J.*)—On 11th January, 1960, the Advocate-General applied to the High Court of Andhra Pradesh, Hyderabad for action against the appellant Prabhakar Rao H. Mawle under section 2 of the Vexatious Litigation (Prevention) Act, 1949 (Madras Act VIII of 1949), on the allegation that Mawle had been "habitually" and "without any reasonable ground" instituting "vexatious proceedings" in the Courts within the cities of Hyderabad and Secunderabad and also in the High Court and appearing in the cases in person ; that he was responsible for a considerable amount of litigation or, in other words, that he was a vexatious and habitual litigant. In support of the petition for the invocation of the punitive provisions of the Act, the Advocate-General referred to the following cases :—

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*C.A. No. 900 of 1963 with W.P. No. 146 of 1961 and C.M.P. No. 186 of 1962. 9th April, 1965.

† (1961) 2 An.W.R. 187.

(i) In C.R.P. No. 1765 of 1958 Mawle described the judgment of the lower Court as : "........................ shocking to the sense of justice, a grave dereliction of duty, flagrant abuse of fundamental principles of law and the natural justice, full with errors patent on the face, showing a gross manifest injustice done through the tyrannical arbitrary acts."

It was stated that Mawle apologised to the High Court to escape proceedings for contempt of Court.

(ii) He filed a W.P. No. 1369 of 1958 after the above Civil Revision Petition was dismissed and then preferred an appeal C.C.C.A. No. 42 of 1959.

(iii) He filed a stay petition against an intended execution before steps were taken and when the petition was dismissed he filed an appeal C.M.A. No. 86 of 1959 and obtained stay.

(iv) He filed an appeal against the dismissal of the W.P. No. 1369 of 1958.

He was thus said to have asked for five remedies in one suit (O.S. No. 200 of 1958).

(v) In an appeal filed on 3rd June, 1959 he did not pay court-fee of Rs. 995 as stamps were not available undertaking to pay the balance which he did not pay.

(vi) In S.R. No. 38516 and S.C.C.M.P. Mawle stated that as he had appeared in person—

"without any weightage to his submissions though of law, for in the ends of justice, as against the professional privileges claimed by both these veteran advocates (Mr. O. V. Subbarayadu and Mr. Hari Narayanalal) even though they had taken the role of a party, sole witnesses, swearing false affidavits ....".

(vii) In S.R. No. 12409 of 1959 against decree in O.S. No. 109 of 1958, though himself the sole defendant, Mawle caused to be preferred an appeal *in forma pauperis* by his wife and children, getting the judgments under appeal privately printed and certifying them as true.

(viii) C.R.P. No. 1094 of 1959 against the judgment in Suit No. 198/2 dismissed against his tenant he filed a revision petition which was dismissed *in limine*.

(ix) C.R.P. No. 988 of 1959 filed against I.A. No. 230 of 1958 in O.S. 99/2 of 1957 of the City Civil Court, Hyderabad was dismissed *in limine*.

(x) He has filed S.R. No. 31845 of 1959 as L.P.A. against an order refusing to review C.R.P. against a Small Cause Suit and S.R. No. 27605 of 1959 as a L.P.A. against an order in a petition refusing to condone the delay in filing a review petition in a C.R.P.

(xi) C.R.P. No. 954 of 1959 filed against an order in L.R. petition in a Small Cause Suit, originally attempted to be filed as an appeal. C.M.P. No. 5518 filed and stay ordered on condition that Mawle should deposit the decretal amount. He then withdrew the C.M.P.

(xii) Several criminal matters in High Court. Complaint in Crl.App. No. 406 of 1958 and Crl.R.C. No. 506 of 1959.

(xiii) C.M.P. No. 1858 of 1957 for taking action against the respondent for alleged contempt of Court.

(xiv) S.R. No. 43198 of 1959, a L.P. Appeal.

The Advocate-General claimed that though the Act was not extended to the area covered by the former Hyderabad State, it must be treated as the law in force there by reason of the States Reorganisation Act, 1956.

Mawle was heard on notice and, as is to be expected from a litigatnt of his sort, filed a fairly long statement in reply denying each accusation and explaining his conduct. He questioned the jurisdiction of the High Court of Andhra Pradesh to take action under the Act as its provisions were not extended to the area comprised in the former State of Hyderabad. He challenged the Act as *ultra vires* and unconstitutional on the ground that it abridged the right of citizens to seek redress in a Court of law. He stated that he was a businessman and a landlord and owned considerable properties in the city of Hyderabad and other cities in the District and the State. He produced a certificate from the District Magistrate. He explained that owing to unpleasant experience he had to take away his work from Advocates and since 1952 he had started conducting his own cases. He alleged that he had to recover a couple of lakhs of rupees from his clients/tenants, etc., and had, therefore, to file a large number of cases. He attempted an explanation of the cases to which the Advocate-General had referred in his petition. He contended that the Act was not in force in the area comprised in the former State of Hyderabad which after the States Reorganisation Act, 1956, became a part of the State of Andhra Pradesh and he challenged the Act itself as unconstitutional.

The High Court by its judgment dated 21st April, 1961, now under appeal, held that the Act was both constitutional and *intra vires*, that the High Court had jurisdiction to make the order and that action under the Act was called for. The High Court ordered that no proceeding, civil or criminal, should be instituted by Mawle in the City of Hyderabad without the leave of the High Court, in the City of Secunderabad, without the leave of the Chief City Civil Judge and elsewhere without the leave of the District and Sessions Judge concerned. A copy of the order of the High Court was published in the Gazette of Andhra Pradesh as required by the Act. Mawle sought a certificate under Articles 132, 133, or 134 of the Constitution but the certificate was refused on the ground that no substantial question of law as to the interpretation of the Constitution or otherwise was involved. The petitioner then applied for and obtained Special Leave from this Court and filed the present appeal.

The Act with which we are concerned, though a copy substantially of 16 and 17 Vict., c. 30 [now replaced by section 51 of the Supreme Court of Judicature (Consolidation) Act, 1925 : 15 and 16 Geo. V.c. 49] is perhaps the only one of its kind in India. Its provisions are extremely brief and they may be read here:

"1. *Short title, extent and commencement.*—(1) This Act may be called THE VEXATIOUS LITIGATION (PREVENTION) ACT, 1949.

(2) It extends to the whole of the State of Madras.

(3) It shall come into force at once.

2. *Leave of Court necessary for vexatious litigant to institute proceedings.*—(1) If, on an application made by the Advocate-General, the High Court is satisfied that any person has habitually and without any reasonable ground instituted vexatious proceedings, civil or criminal, in any Court or Courts, the High Court may, after giving that person an opportunity of being heard, order that no proceedings, civil or criminal, shall be instituted by him in any Court—

(i) in the Presidency-town, without the leave of the High Court ; and

(ii) elsewhere, without the leave of the District and Sessions Judge.

(2) If it appears to the High Court that the person against whom an application is made under sub-section (1), is unable, on account of poverty, to engage a pleader, the High Court may engage a pleader to appear for him.

Explanation.—For the purpose of this section 'pleader' has the same meaning as in section 2, clause (15) of the Code of Civil Procedure, 1908.

3. *Leave to be granted only if* prima facie *ground exists.*—The leave referred to in section 2, sub-section (1), shall not be given in respect of any proceedings unless the High Court or, as the case may be, the District and Sessions Judge, is satisfied that there is *prima facie* ground for such proceedings.

4. *Proceedings instituted without leave to be dismissed.*—Any proceedings instituted by a person against whom an order under section 2, sub-section (1), has been made, without obtaining the leave referred to in that sub-section shall be dismissed :

Provided that this section shall not apply to any proceedings instituted for the purpose of obtaining such leave.

5. *Publication of orders.*—A copy of every order made under section 2, sub-section (1), shall be published in the *Fort St. George Gazette*."

The High Court of Andhra Pradesh has held that it enjoys all the jurisdiction of the former High Court of Madras and thus the provisions of the Act create a jurisdiction in the High Court capable of being exercised in Telangana Area even though the Act as such, has not been extended to this part of the territory of the State. The High Court also holds that the Act is perfectly valid.

In this appeal in addition to questioning the order on the above ground and also merits the appellant contends that the Madras Act itself was invalid inasmuch as it was not covered by any Entry in List II or III of the Government of India Act, 1935 and had not received the assent of the Governor-General. This argument is without substance. The Act had received the assent of the Governor-General and the subject of the legislation was covered by Entries 2 of List II and 2 and 4 of List III of the Government of India Act, 1935. The next argument of the appellant before us is that this Act is unconstitutional because it prevents some citizens from approaching the Court and obtaining relief to which everyone is

entitled in a State governed by Rule of Law. This argument really invokes Article 19 and Article 14. The latter Article is invoked because the Act, according to the appellant, seeks to create an unreasonable distinction between litigant and litigant. This argument is also not acceptable to us because the litigants who are to be prevented from approaching the Court, without the sanction of the High Court, etc., are in a class by themselves. They are described in the Act as persons who 'habitually' and 'without reasonable cause' file vexatious actions, civil or criminal. The Act is not intended to deprive such a person of his right to go to a Court. It only creates a check so that the Court may examine the *bona fides* of any claim before the opposite party is harassed. Such an Act passed in England, has been applied in several cases to prevent an abuse of the process of Court. In its object the Act promotes public good because it cannot be claimed that it is an inviolable right of any citizen to bring vexatious actions without control, either legislative or administrative. The Act subserves public interest and the restraint that it creates is designed to promote public good. The Act does not prevent a person declared to be habitual litigant from bringing genuine and *bona fide* actions. It only seeks to cut short attempts to be vexatious. In our judgment, the Act cannot be described as unconstitutional or offending either Article 19 or Article 14.

The next contention of the appellant is that the Act has not been extended to the area of the former State of Hyderabad and the High Court cannot exercise jurisdiction in that area. This contention merits close scrutiny. The High Court has given a history of the evolution of the State and of the High Court of Andhra Pradesh. It is common knowledge that the High Court of Madras was founded by Letters Patent of 1865 and exercised all original, appellate and other jurisdictions conferred by that Letters Patent. The Act, which was passed by the Madras Provincial Legislature in 1949 conferred jurisdiction upon the Madras High Court to deal with cases of habitual litigants who were persistently filing vexatious actions and were guilty of an abuse of the process of Court. This jurisdiction belonged to the High Court of Madras by virtue of the Act and was not an inherent jurisdiction whether as a Court of Record or otherwise.

When the State of Andhra was formed in 1953 by the Andhra State Act of 1953, the High Court of Madras ceased to exercise jurisdiction over the territory of the State of Andhra. This jurisdiction was then to be exercised by the High Court of Andhra from a date to be appointed by the President. The jurisdiction of the Andhra High Court was to be the same as that of the Madras High Court. Section 30 of the Andhra State Act read as follows :—

"30. *Jurisdiction of Andhra High Court.*—The High Court of Andhra shall have, in respect of the territories for the time being included in the State of Andhra, al such original, appellate and other jurisdiction as, under the law in force immediately before the prescribed day, is exercisable in respect of the said territories or any part thereof by the High Court at Madras."

By virtue of this section the new High Court possessed the same powers and jurisdiction as the original Madras High Court in its territory. But by section 53 of the Andhra Act no change was effected in the territorial extent of the laws and references in all laws to the State of Madras were to be adapted to refer to the new State in its application to the new State of Andhra. In other words, the Act continued to be an Act in force in the Andhra State and the Andhra High Court possessed the same jurisdiction as the former Madras High Court. So far no difficulty can be seen, but it is obvious that the original jurisdiction of the High Court of Madras in the Presidency Town could not be exercised at Guntur and did not follow the High Court.

The next change came in 1956 by the States Reorganisation Act, 1956. By that Act certain territories were amalgamated with the State of Andhra and prominent among those territories was the former Hyderabad State which for convenience may be referred to here as 'the Telangana Area'. The City of Hyderabad and the City of Secunderabad are in that area. The States Reorganisation Act, 1959 contained a special provision to limit the territorial extent of the

laws in force in the different areas which were combined to form the State of Andhra Pradesh. Section 119 of the States Reorganisation Act provided as follows :—

"119. *Territorial extent of laws.*—The provisions of Part II shall not be deemed to have effected any change in the territories to which any law in force immediately before the appointed day extends or applies, and territorial reference in any such law to an existing State *shall, until otherwise provided by a competent Legislature or other competent authority, be construed as meaning the territories within that State immediately before the appointed day.*"

The appellant relies upon this provision to state that the area of operation of the Act can only be the former territories of the State of Andhra and the Act is not applicable in the territory comprised in the Telangana Area. The other side contends that by virtue of section 65 the High Court of Andhra Pradesh acquires all the jurisdiction of the High Court of the State of Andhra and therefore it requires the jurisdiction invested by the Act in the former Andhra High Court. Section 65 of the States Reorganisation Act, 1956 reads as follows :—

"65. *High Court of Andhra Pradesh.*—(1) As from the appointed day,—

(*a*) the jurisdiction of the High Court of the existing State of Andhra shall extend to the whole of the territories transferred to that State from the existing State of Hyderabad ;

(*b*) the said High Court shall be known as the High Court of Andhra Pradesh ; and

* * * * *"

The question that arises is whether the application of the Act in the Telangana Area is made impossible by section 119 of the Act of 1956 or depends upon section 65 of that Act. If the Act under which action is purported to be taken can be said to have operated territorially then it is obvious that the extent of territory in which it was to apply was not only not enlarged by the States Reorganisation Act but was kept rigid by limiting it to the territory of the former Andhra State. If, however, that Act created a jurisdiction in the High Court to deal with a particular class of litigants, who were habitually bringing vexatious suits it may be then possible to contend that jurisdiction continues to vest in the High Court of Andhra Pradesh. The High Court has viewed this matter from the latter angle and come to the conclusion that section 65 and not section 119 controls the matter.

The argument of the High Court is that the Act controls litigation and creates a new procedure in respect of persons who indulge habitually in vexatious litigation. The Act confers a jurisdiction to put such persons under a procedural restraint and this jurisdiction, the High Court holds, inhered in the former Madras High Court and later in the Madras and the Andhra High Courts separately and now it inheres in the Andhra Pradesh High Court. In the opinion of the High Court, the jurisdiction can be exercised within all the territories subject to the Andhra Pradesh High Court including the Telangana Area.

Mr. K. R. Choudhury in supplementing this reasoning points out that the High Court of Madras could take action against any person who acted in a manner to attract the provisions of the Act, irrespective of where the person came from. He contends that a vexatious litigant from Bengal or Bombay could be visited with the punitive provisions of the Act and submits that there is no reason why the Andhra Pradesh High Court cannot control the practice and procedure in the Courts of the Telangana Area in the same way. According to him, the Act must be treated as extended to the Telangana Area as the Andhra Pradesh High Court continues to possess all the jurisdiction of the former Madras High Court. This was also the original plea of the Advocate-General in his petition in the High Court, though not apparently accepted by the High Court.

We do not accept the argument of Mr. Choudhury. The Madras Act was applied by the Legislature only to the Madras Presidency. Suppose it had been applied to one district only. Could the High Court have said that notwithstanding the limited application, it would take action in the other districts of the Madras Presidency ? If it could not have extended the territorial limits of the application of the Act to Madras Presidency, the position is not any different now, in view of the

provisions of section 119 of the States Reorganisation Act which clearly lay down that no law of one of the amalgamating States is to be extended to the area of the other amalgamating States except by a competent legislative or other competent authority and further that the law *shall be construed* as restricted to the territories within each State immediately before the Reorganisation. The territorial area is thus not only not enlarged but is frozen. We may now consider whether section 65 of the States Reorganisation Act makes any difference to this position.

The Act was designed to control vexatious litigation and it created for the purpose, a new procedure which applied to persons whose visits to Courts, as litigants, were not only frequent but were also habitually vexatious. The Act enabled the Advocate-General to apply to the High Court and the High Court on being satisfied that a person had been acting in this manner, could make an order that no proceeding thence forward was to be filed by that person in the Presidency Town without the leave of the High Court and elsewhere without the leave of the District and Sessions Judge. The Act was intended to apply in the whole of the Presidency of Madras including the area carved away from the Presidency of Madras and made into the State of Andhra in 1953 and which is now a part of the State of Andhra Pradesh after 1956. The Act was intended to operate territorially as indeed the clause dealing with the extent of application of the Act itself shows. In its operative part also the order was to be made with a territorial distinction between the Presidency Town and the rest of the Presidency of Madras. The order to be passed under the Act contemplated leave of the High Court before a suit was filed in the Presidency Town and the leave of the District and Sessions Judge elsewhere.

It is plain that on its terms the Act cannot apply in the State of Andhra Pradesh at least in so far as the Presidency Town mentioned in section 2 (1) (i) is concerned. That Presidency Town was the City of Madras and therefore section 2 (1) (i) of the Act cannot apply in Andhra Pradesh, because there is no Presidency Town in Andhra Pradesh to which section 2 (1) (i) can now refer. The distinction between the City of Hyderabad and other parts of the State of Andhra Pradesh has been artificially brought into existence by the High Court by making the order in respect of the City of Hyderabad as if it was a Presidency Town. This is legislation pure and simple and it cannot be undertaken by the High Court. Section 2 (1) (i) of the Act can no longer apply without a proper amendment. It may, however, be contended that section 2 (1) (ii) can apply and the whole of the new State of Andhra Pradesh may be taken to be governed by sub-clause (ii). It would, however, be somewhat strange to make the District and Sessions Judge decide whether a particular litigant should be allowed to move the High Court in appeal, revision or in an original proceeding. The Act is unworkable in the State of Andhra Pradesh without substantial modifications to it.

This is not a question merely of procedural jurisdiction as the High Court has reasoned. No doubt the Act as it stood, vested a jurisdiction in the High Court to deal with a particular type of litigant but the Act made the High Court to deal with the matter territorially. It is because the territory has changed that the question arises whether the old jurisdiction of the High Court can now take in new territory. All laws are intended to operate territorially and no Provincial Legislature in India possessed extra territorial jurisdiction. What the Madras Legislature enacted was to operate in its own territory and it said so in the Act. If new territories are to be governed by the Act it must be extended to the new territories and till it is extended the Act can only operate within the old territories and this is the obvious result of section 119 of the States Reorganisation Act.

Thus there are two difficulties in the way of holding that this Act is operative in the Telangana Area of the new State of Andhra Pradesh. To begin with it has not been extended to the area known as the Telangana Area and, till extended, section 119 of the States Reorganisation Act expressly prohibits an extension to the Telangana Area by judicial construction. Secondly, there being no Presidency Town as such in the new State of Andhra Pradesh, section 2 (1) (i) cannot now be made applicable to the new State of Andhra Pradesh, until some other town is

substituted by the Legislature in its place. The mention of the Presidency Town in section 2 (1) (i) was not with a view to indicate the seat of the High Court but was so made because the High Court possessed original jurisdiction in that area. The words 'Presidency Town' might, of course, have been amended to read Hyderabad, the seat of the Andhra Pradesh High Court, but this has not been done. No doubt the Court under section 121 of the States Reorganisation Act possesses a power to construe laws by adapting them in such a manner as to facilitate their application to the newly formed State, but the power which is exercisable is only a power of simple adaptation and not a power of legislation. An increase in the territories in which an Act is to apply is dependent on legislation such as is contemplated by section 119 of the States Reorganisation Act. What the High Court has done is more than an adaptation. It has not only substituted the City of Hyderabad for the Presidency Town but it has also made the law applicable to Telangana Courts contrary to the intendment of section 119 of the States Reorganisation Act. Formerly the seat of the High Court was different and the Act must, on the reasoning have applied there, so that the words 'Presidency Town' must have read as Guntur at first and now they read Hyderabad. In our opinion, the High Court was in error in holding that the Act merely created a procedural jurisdiction in the High Court of Madras which on its division into two High Courts, inhered in both the High Courts and continues to inhere in the High Court of Andhra Pradesh even for purposes of areas to which the Act has not been extended. In this view of the matter the order made by the High Court cannot be sustained and it must be discharged.

We have not gone into the merits and there is much that justified action against Mawle. He has filed dozens of cases and has flooded Courts with litigation often by way of repeated petitions on the same matter. As we find that the Act is not available against him we say nothing more. We may place on record that Mawle expressed his willingness before us to be restrained in his litigation and we hope that he will now make amends for his past conduct. We expect him to behave properly in future.

The appeal is allowed but in the circumstances of the case we make no order about costs.

Shah, J.—The Provincial Legislature of Madras exercising power under the Government of India Act, 1935 enacted the Vexatious Litigation (Prevention) Act VIII of 1949. The material provisions of the Act are :—

"2. (1) If, on an application made by the Advocate-General, the High Court is satisfied that any person has habitually and without any reasonable ground instituted vexatious proceedings, civil or criminal, in any Court or Courts, the High Court may, after giving that person an opportunity of being heard, order that no proceedings, civil or criminal, shall be instituted by him in any Court—

(i) in the Presidency Town, without the leave of the High Court ; and

(ii) elsewhere, without the leave of the District and Sessions Judge.

(2) * * * * *

3. The leave referred to in section 2, sub-section (1), shall not be given in respect of any proceedings unless the High Court or, as the case may be, the District and Sessions Judge, is satisfied that there is *prima facie* ground for such proceedings.

4. Any proceedings instituted by a person against whom an order under section 2, sub-section (1) has been made, without obtaining the leave referred to in that sub-section shall be dismissed:

Provided that this section shall not apply to any proceedings instituted for the purpose of obtaining such leave.

5. A copy of every order made under section 2, sub-section (1) shall be published in the *Fort St. George Gazette.*"

By this Act the High Court of Madras was invested with power to place restrictions upon vexatious litigants. The principle of this legislation, it appears, was borrowed from statute 16 and 17 Vict. c. 30 enacted by the British Parliament. By Article 225 of the Constitution, the jurisdiction of the High Court of Madras, subject to the provisions of the Constitution and to the provisions of any law of the appropriate Legislature remained the same as immediately before the commencement of the Constitution. On 14th September, 1953 the State of Andhra

was carved out of the territories of the State of Madras by the Andhra State Act XXX of 1953. Section 28 of that Act provided :

"(1) As from the 1st day of January, 1956, or such earlier date as may be appointed under sub-section (2), there shall be a separate High Court for the State of Andhra."

The High Court of Andhra which was constituted by a notification issued by the President had by section 30, in respect of the territories included in the State of Andhra, all such original, appellate and other jurisdiction as under the law in force immediately before the prescribed day was exercisable in respect of the territories or any part thereof by the High Court at Madras. The Andhra High Court was therefore a successor of the High Court of Madras and exercised all the powers and administered the same law which the Madras High Court exercised in the territories comprised in the Andhra State. By section 2 (1) of Act VIII of 1949 the High Court of Madras was competent to issue an order against any person that no proceedings, civil or criminal, shall be instituted by him in any Court (i) in the Presidency Town without the leave of the High Court, and (ii) elsewhere, without the leave of the District and Sessions Judge ; and this power, by virtue of section 30 of Act XXX of 1953 became exercisable by the Andhra High Court. The expression "Presidency Town" means by the General Clauses Act, 1897 [section 3 (44)], the local limits of ordinary original jurisdiction of the High Court of Judicature at Calcutta, Madras or Bombay as the case may be, and there was no Presidency Town within the area of the Andhra State as constituted by Act XXX of 1953. The Parliament had, however, with a view to meet anomalies of the present nature expressly provided by section 55 that

"Notwithstanding that no provision or insufficient provision had been made under section 54 for the adaptation of a law made before the appointed day, any Court, * * * required or empowered to enforce such law may, for the purpose of facilitating its application in relation to the State of Andhra * * * construe the law with such alterations not affecting the substance as may be necessary or proper to adapt it to the matter before the Court. * * *"

The expression "Presidency Town" must in the context of the constitution of a separate High Court for Andhra, after the State of Andhra was formed, mean the capital town of the State in which the High Court was located. Such an adaptation does not affect the substance of the Act, and it would facilitate application thereof to the changed circumstances.

The new State of Andhra Pradesh was constituted under the State Reorganisation Act XXXVII of 1956 by incorporating certain areas specified in section 3 to the territory of the old State of Andhra. By section 65 (1) (*a*) from the appointed day *i.e.*, 1st November, 1956 the jurisdiction of the High Court of the existing State of Andhra was, it was declared, to extend to the whole of the territories transferred to that State from the existing State of Hyderabad, the High Court was to be known as the High Court of Andhra Pradesh, and the principal seat of the High Court was to be at Hyderabad. The jurisdiction of the High Court of Andhra was by the express provision made in section 65 (1) (*a*) exercisable over the whole of the territory transferred to that State from the existing State of Andhra. The phraseology used by the Legislature, in my judgment, authorises the new High Court of Andhra Pradesh to exercise all jurisdiction which the High Court of Andhra could exercise before the appointed day.

The High Court of Andhra Pradesh made an order against the appellant on 21st April, 1961 that no proceedings, civil or criminal, shall be instituted by the appellant in the City of Hyderabad without the leave of the High Court ; in the City of Secunderabad without the leave of the Chief City Civil Judge ; and elsewhere without the leave of the District and Sessions Judge concerned. This was manifestly a personal direction which imposed restrictions upon the appellant. The power to impose a ban under section 2 it may be noticed, vests only in the High Court, the power to remove the ban in specific cases is exercisable by the High Court, or a Judge or the District and Sessions Judge according as the proceeding is to be instituted in a Court in the Capital of the State where the High Court is located, or in any Court in the mofussil. There can therefore be no question of conflict of jurisdiction between the High Court and the District Court. Once the High Court

pronounces an order under section 2, it may be removed in appropriate cases only by the High Court where the proceeding is to be instituted in any Court in the capital town in which the High Court is located and elsewhere by order of the District and Sessions Court. The Act confers jurisdiction upon the High Court and does not as a condition of its exercise require that the person to be restrained must be residing or have a domicile in any area within the jurisdiction of the Court invested with jurisdiction. Nor has the order contemplated to be passed any direct territorial operation : it is issued against a person individually and restrains him from instituting proceedings without leave of the Court specified in that behalf. A person—wherever residing or domiciled—may therefore be restrained by an order under section 2.

But it is said that notwithstanding the comprehensive phraseology used by the Legislature in section 65, because of section 119 of the States Reorganisation Act XXXVII of 1956 a somewhat anomalous situation has resulted. It is claimed that the power with which the High Court is invested to prevent a litigant from instituting proceedings which are vexatious may be exercised in respect of proceedings to be instituted in Courts within the limits of the former State of Andhra or which arise from proceedings decided by Courts in that area. The upshot of the argument is that a litigant may be treated as vexatious only in respect of proceedings to be instituted by him in the Courts of the Districts within the former State of Andhra and in respect of proceedings sought to be brought before the High Court in exercise of its appellate, revisional or superintending jurisdiction from orders made by Courts within the territory of the former State of Andhra : he may therefore be subjected to a disability in respect of proceedings to be instituted in some districts in the State and also in respect of proceedings reaching the High Court from cases instituted in those districts, and not in respect of the rest. What the effect of such a view may be upon the exercise of the High Court's jurisdiction under Articles 226 and 227 of the Constitution, or the original jurisdiction, for instance, under the Companies Act or the Banking Companies Act, the appellant who has argued his case personally did not attempt to tackle. Section 119 of the States Reorganisation Act, 1956, provides :

> " The provisions of Part II shall not be deemed to have effected any change in the territories to which any law in force immediately before the appointed day extends or applies, and territorial references in any such law to an existing State shall, until otherwise provided by a competent Legislature or other competent authority, be construed as meaning the territories within that State immediately before the appointed day."

By that section the territorial extent of the laws in operation prior to the appointed day, until amended by a competent Legislature or other competent authority, continues. But section 119 must be read harmoniously with section 65 (1) (*a*). The latter clause declares in unambiguous terms that the jurisdiction of the High Court of the existing State of Andhra shall extend to the whole of the territories transferred to that State from the existing State of Hyderabad. If it be granted that the High Court of the State of Andhra had jurisdiction to pass orders under the Vexatious Litigation (Prevention) Act, it would be difficult to hold that section 119of Act XXXVII of 1956 still restricts the exercise of the power by the High Court to prevent a vexatious litigant from instituting proceedings in certain areas in the mofussil and not in others or from instituting proceedings by way of appeals or revisions from orders and decrees in proceedings instituted in the Courts in the area within the former State of Andhra and not elsewhere. The Parliament having by Act XXX of 1953 invested the High Court of Andhra with authority to exercise *all jurisdiction* which the High Court of Madras possessed within the territories of the State of Andhra as constituted and thereafter having by section 65 (1) (*a*) of Act XXXVII of 1956 extended the exercise of that authority over the entire territory of Andhra Pradesh, in my judgment, it would be impossible to accept the argument that in respect of the jurisdiction conferred by the Vexatious Litigation (Prevention) Act VIII of 1949 the High Court was incompetent to pass the order which it did against the appellant.

I need not add anything to what Hidayatullah, J., has said in upholding the constitutionality of the provisions of the Act, for I agree with him that the Act is not unconstitutional as offending either Article 19 or Article 14 of the Constitution.

On the merits, however, I am of the opinion that the cases which the appellant had instituted in the various Courts did not justify a drastic order of the nature passed against him. The appellant claims that he is the owner of a large estate in the City of Hyderabad, and that is not denied : he also carries on an extensive business and in the course of carrying on his business and managing his estate, he has often to seek recourse to Courts of law. The appellant says that because of certain reasons (which need not be set out) he conducts his litigation before the Courts without any professional assistance. Assuming that the appellant has in instituting and prosecuting cases which he has instituted shown less objectivity and more enthusiasm than a lawyer may in similar cases show, and had attempted to obtain benefit of what he thought were *lacunae* in the law, imposition of a blanket restriction against him of the nature imposed by the High Court may not seem to be warranted. I am unable to agree having carefully considered the nature of the various cases filed by the appellant or from the general progress of those cases as set out in the list of cases filed in this Court and the orders passed therein that those proceedings are vexatious or frivolous.

I would therefore allow the appeal, but not on the grounds which are set out by Hidayatullah, J.

ORDER OF THE COURT :—

Writ Petition No. 146 *of* 1961.—In view of our decision in Civil Appeal No. 900 of 1963 pronounced to-day allowing the appeal against the judgment of the High Court of Andhra Pradesh in C.M.P. No. 239 of 1960 this petition becomes infructuous and may be filed. There will be no order as to costs

C.M.P. No. 186 *of* 1962.—The petitioner was ordered to deposit court-fee on his Writ Petition by an order of this Court dated 4th October, 1961. He has now applied for refund of that court-fee claiming that the writ petition was concerned with a criminal matter and no court-fee was payable under the rules of this Court. The present application amounts to an application for review of the earlier order and should have been moved as such. In this view of the matter it should be dismissed. There will be no order as to costs.

K.S. ——— *Appeal allowed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, RAGHUBAR DAYAL AND R. S. BACHAWAT, JJ.

Chidambara Iyer and others .. *Appellants**

v.

P. S. Renga Iyer and others .. *Respondents.*

Madras Agriculturists' Relief Act (*IV of* 1938) (*as amended by Acts XV and XXIII of* 1943), *section* 9-*A* (10) (ii) (*b*)—*Applicability.*

In order to earn the exemption from the provisions of section 9-A (10)(ii) of the Madras Agriculturists Relief Act, 1938, the mortgagee's rights or interests in the property usufructuarily mortgaged shall have been transferred for valuable consideration or shall have been partitioned among the joint owners during the period between 30th September, 1937 and 30th January, 1948.

In the instant case it was found (1) on 22nd August, 1934, the family created a trust in respect of a sum of Rs. 36,988-9-8 for charitable purposes; (2) on 3rd September, 1939, the usufructuary mortgage right of the family was given to the charity in discharge of the obligation undertaken under the trust created on 22nd August 1934 and (3) the dedication of the said property was affirmed in the regular partition deed. On the question whether the usufructuary mortgage was entitled to the exemption under section 9-A (10) (ii) of Madras Act IV of 1938 ;

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*C.A. No. 200 of 1963. 6th May, 1965.

Held, the mortgage was not liable to be scaled down. The family had transferred the mortgage interest in trust to the charity for valuable consideration within the meaning of section 9-A (10) (ii) (*b*) of Madras Act (IV of 1938). The liability under the trust created in 1934 was valuable consideration for transfer of the mortgage interest to the charity.

Appeal from the Judgment and Order, dated 8th November, 1955 of the Madras High Court in A.A.O. No. 577 of 1952.†

R. Ganapathy Iyer and *S. N. Prasad*, Advocates, and *J. B. Dadachanji*, Advocate of *M/s. J.B. Dadachanji & Co.*, for Appellants.

K. N. Rajagopala Sastri, Senior Advocate, (*M. R. Krishna Pillai* and *M. S. K. Aiyangar*, Advocate, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Subba Rao, J.—This appeal by certificate raises the question of the applicability of section 9-A (10) (ii) (*b*) of the Madras Agriculturists Relief Act (Madras Act IV of 1938), hereinafter called the Act, as amended by Act XV of 1943 and Act XXIII of 1943, to a mortgage in respect whereof a petition for scaling down the said mortgage debt under the provisions of the Act was filed.

On 18th August, 1930, the predecessors-in-interest of the appellants executed a registered deed of usufructuary mortgage in favour of the family of Samu Pattar for Rs. 31,000. No interest was stipulated in the document, but the mortgagee was put in possession of the mortgage property. The mortgagee had to enjoy the income from the said property, and after appropriating interest due on the mortgage and after paying the revenue and the *jenmi's purappad*, he was to pay to the mortgagors one *edangali* of paddy every year within the 30th of Makarom. The mortgage was redeemable after the expiry of 60 years from the date of the mortgage. The 11th appellant and his deceased father, Narayana Iyer, filed O.P. No. 43 of 1949, on the file of he Court of Subordinate Judge, Palghat, under sections 9-A and 19-A of the Act for scaling down the mortgage debt thereunder. To that petition, appellants 1 to 10 and other mortgagors were impleaded as respondents 2 to 14, and the mortgagee, as the first respondent. As the said first respondent-mortgagee raised the plea that the mortgage interest had been set apart by the members of his family to a charity, respondents 15 and 16, who were the senior most male members of their respective branches of the mortgagee-family, were also impleaded as respondents to the said petition.

The contesting respondents, *inter alia*, raised two pleas, namely, (1) the mortgage property was transferred in trust to the charity for valuable consideration and, therefore, section 9-A (10) (ii) (*b*) of the Act was attracted and hence the mortgage was not liable to be scaled down under the Act, and (2) the said mortgage right was the subject-matter of a partition amongst the several members of the joint family consisting of respondents 1, 15, 16, and others and, therefore, the said mortgage was exempted under section 9-A (10) (ii) (*c*) of the Act from its operation.

On the first question the learned Subordinate Judge held that "The transferee, *viz.*, the charity, not being a transferee for valuable consideration" the proviso to section 9-A (10) (ii) (*b*) did not apply; and on the second question he held that the partition of the family in the sense of division in status was effected before the relevant period and, that apart, as the mortgage interest of the family was not allotted to some or one of the members of the family but a trust was created in respect thereof in favour of a charity, section 9-A (10) (ii) (*c*) had no application. In the result he allowed the petition and granted a certificate to the petitioners and respondents 2 to 14 to the effect that the amount due under the mortgage on the date he made the order was Rs. 8,788-14-10.

As the first respondent died pending the proceedings in the Court of the Subordinate Judge, the 17th respondent, his younger brother, was brought on record in his place.

Against the order of the learned Subordinate Judge, the 17th respondent preferred an oppeal to the High Court of Judicature at Madras, being A.A.O. No. 577

† (1956) 1 M.L.J. 503.

of 1952. To that appeal, the petitioners and other respondents were made respondents. On the first question, the High Court held that the family transferred the mortgage interest for valuable consideration in favour of the charity within the meaning of paragraph (*b*) of section 9-A (10) (ii) of the Act; and on the second question it held that the expression " partition " in section 9-A (10) (ii) (*c*) meant partition by metes and bounds and though it was effected during the relevant period the mortgage interest in the property was not the subject of partition and, therefore, the said provision was not attracted to the mortgage in question. In the result, the High Court, disagreeing with the view expressed by the learned Subordinate Judge, set aside the order made by him and dismissed the petition filed by the mortgagors for scaling down the debt. Against the said order the mortgagors have preferred, on a certificate issued by the High Court, the present appeal to this Court.

Mr. Prasad, learned Counsel for the appellants contended that (i) there was no transfer of the mortgage property in trust for a charity but the said property continued to be the property of the joint family, though a charge was created on its income for some charitable purposes ; and (ii) there was no transfer of the mortgage interest for valuable consideration.

Mr. Rajagopala Sastri, learned Counsel for the respondents, apart from attempting to sustain the finding of the High Court that there was a transfer of the mortgage property for valuable consideration, contended that the transfer of the mortgage property in trust was an integral step in the process of partition and, therefore, in law and in fact it must be held that the said property was also subject of partition within the meaning of paragraph (*c*) of section 9-A (10) (ii) of the Act.

At the outset it will be convenient to read the relevant provisions of section 9-A (10) (ii) of the Act.

"Nothing contained in this section, except sub-sections (1) and (2), shall apply to any mortgage—

(ii) in respect of property situated in any other area in the cases mentioned below:

(*a*) Where during the priod after the 30th September, 1937, and before the 30th January, 1948..........

(*b*) Where during the period aforesaid, the mortgagee or any of his successors-in-interest has transferred either wholly or in part the mortgagee's rights in the property *bona fide* and for valuable consideration, then to the whole or such part as the case may be :

* * * *

(*c*) Where the mortgagee's interest in the property subject to the mortgage or any part of such interest belonged to, or devolved on, two or more persons and during the priod aforesaid, a partition has taken place among such persons, then, to the whole or such part of the interest, as the case may be."

It will be seen from the said provisions, so far relevant to the present enquiry, that the mortgagee's rights under paragraph (*b*) or mortgagee's interest in the property shall have been *bona fide* transferred for valuable consideration or shall have been partitioned among the joint owners during the period between 30th September, 1937, and 30th January, 1948, in order to earn the exemption from the operation of the provisions of section 9-A (10) (ii) of the Act. As we agree with the High Court that the mortgage interest was transferred for valuable consideration within the meaning of paragraph (*b*) of section 9-A (10) (ii) of the Act, we are relieved of the necessity to consider either the scope or the applicability of paragraph (*c*) of the said section to the mortgage in question.

Under paragraph (*b*) of section 9-A (10) (ii) of the Act two questions arise, namely, (1) whether the mortgage rights in the property were legally transferred in trust in favour of the charity ; and (2) if so, whether the transfer was for valuable consideration. If there was such a transfer, it is not disputed that it was effected during the relevant period mentioned in the section.

Exhibit B-1 is an agreement dated 22nd August, 1934, executed between the members of the mortgagee-family. The relevant part of the document reads :

" All of us have out of our free will and consent set apart on this day the sum of Rs. 36,988-9-8 found entered against the date 30th Meenom, 1109 M.E. (12th March, 1934) in the ledger book under the head " kulathoorayyan " in the accounts maintained in respect of our common family business, the interest accrued thereon from the aforesaid date, the sum of Rs. 1,490 found entered in the

ledger under the head "Patasala"........(other properties are mentioned)......for charitable purposes for the welfare and prosperity of our family. And it is stipulated that the undermentioned ceremonies shall be performed with the income derived from the aforesaid properties.

* * * * (specific amounts to be spent for different purposes are given) * * * *

It has been stipulated that the management of the aforesaid properties endowed for purposes of charity shall be conducted by the seniormost male members of the respective branches for each year by rotation, commencing from first Kanni 1110 M.E. (17th September, 1934) and the accounts shall be rendered to the satisfaction of the members of the rest of the branches at the end of the year."

The recitals of this document are clear and unambiguous. Under this document the members of the family set apart a specific amount and other properties for charitable purposes. Under the scheme of administration the seniormost male members of the different branches of the family were constituted the managers and they were directed to pay specified amounts for specific religious purposes. The members of the family were the authors of the trust. The seniormost male members of the respective branches were the trustees. The charity was the beneficiary. The subject-matter of the trust was the said amount and the properties. All the necessary ingredients of a trust are present in the document. It is therefore, clear that the document created a valid trust of the said amount.

Exhibit B-2 dated 3rd September, 1939, is a part of "schedules of partition allotted to the members of the E. N.A.S. family". It reads :

"Particulars regarding the properties that have been set apart for charity from our joint family :—

1. Properties situate in Kunisseri Amsom which belong to N.C. Sivarama Ayyar of Nellissery Grammom and others which belong to our family in (usufructuary mortgage) right for a sum of Rs. 31,000 and which are held benami in the name of Appathura Pattar *alias* Seshan Pattar of Melakode Grammom."

The document contains other items of properties set apart for charity.

Exhibit B-3, the registration copy of the partition deed dated 9th September, 1939, shows that the schedule was prepared in connection with the oral partition agreed upon on 3rd September, 1939. After orally dividing the properties among the members of the family and setting aside the said mortgage interest and other properties for charity, on 9th September, 1939, the said registered partition deed was executed embodying the terms of the oral partition. It is common knowledge that before a regular registered partition deed is effected, there will necessarily be a stage when the terms embodied in the registered document are agreed upon orally between the parties. It is a necessary prelude for executing the formal document. Exhibit B-3 appears to be such a document embodying the terms orally agreed upon between the parties at an earlier stage. This document governs the rights of the parties. The relevant recital in the document reads :

"Out of the immovable properties which were set apart previously as mentioned in paragraph 2 above, which were reserved in common at that time and which were acquired subsequently, some immovable properties were set apart under schedule I for our common family 'private trust' for the purpose of charity. Under the oral partition effected on 3rd September, 1939, all the immovable properties belonging to our common family excluding those set apart for charity as stated above were partitioned into 9 schedules from A to I in accordance with our proportionate shares........But whereas we have all agreed that the management in respect of the properties in the aforesaid schedule I set apart for charitable purpose and the expenses, etc., to be met with the income shall be conducted and caused to be conducted without default as set out in the aforesaid agreement entered into between us on 22nd August, 1934, and that we shall also conduct ourselves in future in accordance with the terms of the said agreement, no special stipulation has been made in this partition deed with regard to the abovementioned properties endowed for charitable purpose and the incomes derived therefrom."

This registered partition deed in terms affirmed the earlier creation of trust.

From these documents it can be reasonably held as follows: (1) On 22nd August, 1934, the family created a trust in respect of a sum of Rs. 36,988-9-8 for charitable purposes ; (2) on 3rd September, 1939, the usufructuary mortgage right of the family in Exhibit A-1 was given to the charity in discharge of the obligation undertaken under Exhibit B-1 ; and (3) the dedication of the said property was affirmed in the regular partition deed. In short, under the said documents the family transferred to the charity their interest in the usufructuary mortgage, Exhibit A-1, in

discharge of their obligation to pay the trust a sum of Rs. 36,988-9-8. Indeed the High Court, on a consideration of the said documents arrived at exactly the same finding. The learned Judges of the High Court observed :

" On a comparison of the charity properties mentioned in Exhibits B-1 and B-2, we find that item No. 3 in Exhibit B-1 is the same as item No. 2 in B-2. Similarly item No. 4 in Exhibit B-1 corresponds to item No. 3 in Exhibit B-2. Item No. 5 in Exhibit B-1 is admitted to be item No. 4 in Exhibit B-2 and item No. 6 in Exhibit B-1 is the same as item No. 5 in Exhibit B-2. Items Nos. 1 and 2 in Exhibit B-1 are not mentioned in Exhibit B-2, but they are replaced by item No. 1 in Exhibit B-2 which is the mortgage. It is seen that items 1 and 2 in Exhibit B-1 are credit entries of the aggregate amounts in the family business accounts but what is done by Exhibit B-2 is the replacement of those amounts by the mortgage in question. No evidence has been let in as to what has become of those two amounts. Evidently being credit entries they have been converted into tangible immovable assets for the purposes of conducting the charity. It is more or less in the nature of substituting a credit entry by means of some property, *i.e.*, the discharge of the liability of those credit entries by setting apart immovable property. Exhibit B-3, dated 9th September, 1939, is a registered copy of the partition deed by the members of the family and paragraphs 2 and 4 of that document make provisions with regard to the matters in question which runs follows:

* * * * *"

Later on the learned Judges proceed to state :

" We are unable to accept the argument for the reasons stated already. It is clear as we have referred to already that for the amounts entered as credit in the family business account which was a liability payable by the family from and out of the interest under Exhibit B-1 the religious functions have to be performed and that there was a substitution of the mortgage amount under Exhibit B-3. Mr. Ramachandra Aiyar contends that there is no oral evidence about that substitution ; nor is it possible to conclude from the meagre and scanty documentary evidence let in that there has been any such substitution. The answer to this argument is that the credit amount in favour of Kolathu Iyen is only a ledger entry making the liability on the family with regard to a sum of money out of which certain charities have to be performed. In Exhibit B-3 we do not find any credit entry in the name of Kolathu Iyen as well as patasala account. Those liabilities must be deemed to have been discharged by Item I in Exhibit B-2 namely, the mortgage amount. The result is the discharge of one liability by another and we are unable to see that such a state of things would not amount to a transfer. "

These observations also make it clear that the learned Judges clearly held that the mortgage interest in Exhibi A-1 was transferred in discharge of the liability undertaken under Exhibit B-1. But strong reliance was placed by the learned Counsel for the appellants on the following concluding observation of the learned Judges :

" In the present case the joint family has lost the mortgage interest and the trust has gained that interest. Therefore the transfer under Exhibit B-3 must be deemed to be for valuable consideration."

Relying upon this observation the learned Counsel commented that the learned Judges held that a mere transfer of an interest in favour of another was in itself a transfer for valuable consideration. To accept this argument is to ignore the elaborate discussion that preceded the said observation and the relevant extracts from the judgment we have extracted earlier. In the context of the preceding discussion the said observation can only mean that the transfer in favour of a charity in discharge of the earlier obligation is a transfer for valuable consideration. Agreeing with the High Court, we hold that there was a transfer of the mortgage interest under Exhibit A-1 in trust to a charity in discharge of an earlier obligation undertaken by the family to set apart a sum of Rs. 36,988-9-8 in favour of the charity. Under paragraph (*b*) of section 9-A (10) (ii) of the Act, to attract that provision the transfer shall be for a valuable consideration. The short question, therefore, is whether the transfer in trust of a property in discharge of an earlier obligation was for valuable consideration within the meaning of paragraph (*b*) of section 9-A (10) (ii) of the Act. So stated there can only be one answer. The classic definition of " valuable consideration " is given in *Currie* v. *Misa*[1], thus :

" A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other. "

Section 2 (*d*) of the Contract Act defines consideration thus :

1. (1875) L.R. 10 Ex. 162.

"When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise."

So far as is relevant to the present enquiry, the content of the two definitions is practically the same, though the expression "valuable" is implied under section 2 (*d*) of the Contract Act, for consideration shall be "something which not only parties regard but the law can regard as having some value". From the definitions it is apparent that consideration may be negative or positive. In the present case the mortgage interest was transferred in trust to the charity. What was the consideration that passed from the charity to the famliy? The family was under an obligation to pay to the charity the amount set apart to it under Exhibit B-1. The mortgage interest was transferred in discharge of that obligation. That is to say, the charity agreed as a consideration for the transfer of the mortgage interest not to enforce its right to recover that amount from the family. The charity gave up that right in consideration of the mortgage interest acquired by it. We, therefore, hold that the family transferred the mortgage interest in trust to the charity for valuable consideration within the meaning of section 9-A (10) (ii) (*b*) of the Act. It follows that the mortgage, Exhibit A-1, was rightly held by the High Court not liable to be scaled down under the provisions of the Act.

In the reply the learned Counsel for the appellants sought to raise another plea, namely, that there was no valid transfer of the mortgage deed in favour of the charity inasmuch as the said transfer was not effected by a registered document. This plea was not raised at any stage of the litigation, presumably because Exhibit B-3 was a registered document. We cannot, therefore, permit the appellants to raise the plea for the first time before us.

In this view it is not necessary to express our opinion on the question whether paragraph (*c*) of section 9-A (10) (ii) of the Act was attracted to the mortgage in question.

In the result, the appeal fails and is dismissed with costs.

K.S. *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—A. K. SARKAR, M. HIDAYATULLAH AND V. RAMASWAMI, JJ.

Shri Mahant Kaushalya Das .. *Appellant**

v.

State of Madras .. *Respondent.*

Criminal Procedure Code (V of 1898) section 243—Requirements —Plea of guilty not recorded in the words used by accused—Interpretation of the plea by the Bench Clerk without the statement being recorded—If sufficient to sustain conviction—Section 362 (2-A)—If applicable.

The requirements of section 243 of the Criminal Procedure Code, are mandatory in character and a violation of these provisions vitiates the trial and renders the conviction legally invalid. The plea of guilty should as nearly as possible, be recorded in the accused's own language in order to prevent any mistake or misapprehension. The violation of this provision is sufficiently serious to invalidate the conviction of the accused. Interpretation of the accused's plea of guilty by the Bench Clerk to the Court is not sufficient compliance with the requirement of section 243 that it should be recorded " as nearly as possible in the words used by him ". Section 362 (2-A) which makes it sufficient for the Magistrate to make a memorandum of the substance of the examination of the accused without recording the actual words used has no application in a case. Where the accused pleads guilty and the special provision of section 243 would be attracted in such a case.

Appeal from the Judgment and Order dated the 29th April, 1963 of the Madras High Court in Criminal Appeal No. 251 of 1963.

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*Cr.A. No. 131 of 1963. 7th May, 1965.

E. C. Agarwala and *P. C. Agarwala*, Advocates, for Appellant.

A. Ranganadham Chetty, Senior Advocate, (*A. V. Rangam*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is brought by certificate granted under Article 134 (1) (*c*) of the Constitution from a judgment of the Madras High Court dated 29th April, 1963, in Criminal Appeal No. 251 of 1963 affirming the conviction of the appellant—Sri Mahant Kaushalya Das under section 4 (1) (*a*) of the Madras Prohibition Act and the sentence of one year rigorous imprisonment and a fine of Rs. 50 or in default rigorous imprisonment for one month.

The appellant is the hereditary Mahant of Sri Bairaghi Matam—a Hindu Religious and Charitable Institution of a monastic nature. The appellant has been residing in the Matam premises, Elephant Gate, Madras which is a public place of worship. On 22nd March, 1963 at about 10 A.M. the appellant was arrested by the police and immediately produced before the VIII PresidencyMagistrate on the same day on a charge under section 4 (1) (*a*) of the Madras Prohibition Act on the allegation that he was in possession of 3,960 grams of ganja concealed in a wooden box in the Matam premises without any permit. The appellant pleaded guilty to the charge and upon that plea he was convicted by the Magistrate to rigorous imprisonment for one year and a fine of Rs. 50 in default to rigorous imprisonment for one month. The appellant preferred Criminal Appeal No. 251 of 1963 to the High Court alleging that his eye sight was very bad and defective, that he was an illiterate person, not acquainted with English or Tamil or with any other South Indian language and that he only knew Hindi as it was spoken in Uttar Pradesh. He also complained that he had no time to consult either his lawyer or his disciples, that the proceedings were rushed through with undue haste, that he did not really plead guilty to the charge and that he never understood the implications of the offence or the proceedings before the Magistrate. The appellant filed an affidavit in support of the appeal before the High Court in regard to these allegations. Kailasam, J., called for a report from the VIII Presidency Magistrate with regard to the allegations made in the affidavit of the appellant. On 23rd April, 1963, the Magistrate submitted a report as follows :

"The particulars of the offence were explained to the accused by the Interpreter. It was translated to accused in Hindi by Sri M. Sukumara Rao, Bench Clerk of this Court who has passed examinations in Hindi. The plea of guilty by the accused was also interpreted to the Court by Sri M. Sukumara Rao. The allegations contained in the affidavit are false."

Thereafter Kailasam, J., confirmed the conviction and sentence and dismissed the appeal.

Learned Counsel on behalf of the appellant put forward the argument that the Magistrate did not comply with the mandatory provisions of section 243, Criminal Procedure Code, that the appellant has been deprived of the substance of a fair trial, and that the conviction of the appellant is legally invalid. It was also submitted on behalf of the appellant that the necessary ingredients of the offence of possession of the contraband article under section 4 (1) (*a*) of the Madras Prohibition Act have not been established as a matter of law.

It is necessary to reproduce, at this stage, the charge framed by the VIII Presidency Magistrate against the appellant as well as the judgment pronounced in the case. The charge reads as follows :

"On 22nd March, 1963 at about 8 A.M., at No. 1, General Muthiah Mudali Street in C-2 limits, the accused was found in possession of 3,960 grams of ganja concealed in wooden box in his Matam premises without any permit. Hence the charge."

The judgment by the Magistrate reads as follows :

"*Judgment dated 22nd March*, 1963.—Accused produced. Pleads guilty. Found guilty. The quantity is very huge *viz.*, 3,960 grams concealed in a wooden box. I convict and sentence him to rigorous imprisonment for one year and to pay a fine of Rs. 50 in default to rigorous imprisonment for one month. Confiscate property."

Section 4 of the Madras Prohibition Act, 1937 (Madras Act X of 1937) has amended by Madras Act VIII of 1958, states :

"4. (1) Whoever—

(*a*) imports, exports, transports or possesses liquor or any intoxicating drug.*****shall be punished—*****

(ii) in any other case with imprisonment for a term which may extend to one year and with fine which may extend to two thousand rupees, but in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the Court, such imprisonment shall not be less than three months and such fine shall not be less than five hundred rupees, in the case of the offence of import, export or transport of liquor or any intoxicating drug falling under clause (*a*) ;*****

(2) It shall be presumed until the contrary is shown—

(*a*) that a person accused of any offence under clauses (*a*) to (*j*) of sub-section (1) has commited such offence in respect of any liquor or any intoxicating drug or any still, utensil, implement or apparatus whatsoever for the tapping of toddy or the manufacture of liquor or any intoxicating drug or any such materials as are ordinarily used in the tapping of toddy or the manufacture of liquor or any intoxicating drug or any materials which have undegone any process towards the manufacture of liquor or any intoxicating drug or from which any liquor or intoxicating drug has been manufactured, for the possession of which he is unable to account satisfactorily, and

* * * * *".

It cannot be dispued in the present case that there has been a violation by the Magistrate of the requirements of section 243 of the Criminal Procedure Code which states :

"243. If the accused admits that he has committed the offence of which he is accused, his admission shall be recorded as nearly as possible in the words used by him ; and, if he shows no sufficient cause why he should not be convicted, the Magistrate may convict him accordingly."

It is stated by the Magistrate in his report that the particulars of the offence were explained to the appellant by the Bench Clerk Sri M. Sukumara Rao and that the plea of guilty by the appellant was interpreted to the Court by the same Bench Clerk. It is manifest from the record that the admission of the appellant has not been recorded "as nearly as possible in the words used by him", as required by section 243 of the Criminal Procedure Code. It is true that in the judgment dated 22nd March, 1963, the Magistrate has said that the appellant "pleads guilty", but the record contains no indication whatsoever as to what exactly the appellant admitted before the Magistrate. In our opinion the requirements of section 243 of the Criminal Procedure Code are mandatory in character and a violation of these provisions vitiates the trial and renders the conviction legally invalid. The requirement of the section is not a mere empty formality but is a matter of substance intended to secure proper administration of justice. It is important that the terms of the section are strictly complied with because the right of appeal of the accused depends upon the circumstance whether he pleaded guilty or not and it is for this reason that the Legislature requires that the exact words used by the accused in his plea of guilty should, as nearly as possible, be recorded in his own language in order to prevent any mistake or misapprehension. It has been held by the Madras High Court in *Queen-Empress* v. *Erugadu*[1], that the violation of the procedure in section 243 of the Criminal Procedure Code was sufficiently serious to invalidate the conviction of the accused. The same view has been taken by the Calcutta High Court in *Shailabala Dasee* v. *Emperor*[2], and by the Allahabad High Court in *Mukandi Lal* v. *State*[3]. In our opinion, these cases correctly lay down the law on the point.

It is submitted on behalf of the respondent that under section 362 (2-A), Criminal Procedure Code, it was sufficient if the Magistrate made a memorandum of the substance of the examination of the accused and that it was not necessary to record the actual words used by the accused. In our opinion, section 362 (2-A) of the Criminal Procedure Code has no application in a case where the accused pleads guilty and the special provision of section 243 of the Criminal Procedure Code would be attracted in such a case. Section 243 of the Criminal Procedure Code is a provision of a special character and according to well-established rule of interpretation

1. I.L.R. 15 Mad. 83.
2. I.L.R. 62 Cal. 1127.
3. A.I.R. 1952 All. 212.

that special provision will take precedence and override the general provision of section 362 (2-A) of the Criminal Procedure Code. We, therefore, reject the argument of Counsel for the respondent on this point.

For these reasons we allow this appeal, set aside the conviction and sentence imposed upon the appellant and order that the case should go back to the VIII Presidency Magistrate, Madras, for being re-tried and brought to a conclusion in accordance with law.

K.S. *Appeal allowed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, J. C. SHAH, N. RAJAGOPALA AYYANGAR AND S. M. SIKRI, JJ.

The State of Madras and others .. *Appellants**

v.

D. Namasivaya Mudaliar and others .. *Respondents.*

Neyveli Lignite Corporation and others .. *Interveners.*

Madras Lignite (Acquisition of Land) Act (XI of 1953), sections 2 and 3 amending Land Acquisition Act (I of 1894)—Vires—Constitution of India (1950) Article 31 before Fourth Amendment—If infringed.

By Madras Act XI of 1953, compensation made payable for compulsory acquisition of land is the value of the land on 28th April, 1947, together with the value of any agricultural improvements made thereon after that date and before publication of the notification under section 4 (1) of the Land Acquisition Act. This deprives the owner of the land of just compensation for compulsory acquisition of his property.

Whether or not it is possible by enacting legislation after the amendment of Article 31 (2) by the Constitution (Fourth Amendment) Act, 1955 (which is not given any retrospective operation) to provide that compensation for compulsory acquisition of land may be fixed on the basis of market value prevailing on a date anterior to the date of the issue of the notification under section 4 (1), in the instant case Madras Act XI of 1953 which was passed before the Constitution (Fourth Amendment) Act, 1955 the fixation of compensation for compulsory acquisition of lands notified many years after the date, on the market rate prevailing on 28th April, 1947, the date on which lignite was discovered is wholly arbitrary and inconsistent with the letter and spirit of Article 31 (2) of the Constitution of India as it stood before it was amended by the Constitution (Fourth Amendment) Act, 1955. It amounts to a flagrant infringement of the fundamental rights of the owner.

Denial to the owner of the land of the value of the structures constructed by him (even of those put up after 28th April, 1947, with the knowledge that the Government may undertake legislation for purpose of compulsory acquisition of the land) would still be denying him just compensation for the loss suffered by him on account of compulsory acquisition of his holding, and would amount to infringement of Article 31 (2) of the Constitution.

Appeals from the Judgment and Decree dated 2nd February, 1959, of the Madras High Court* in Writ Petitions Nos. 1, 2, 202, 203, 204, 309 and 373 of 1958.

A. Ranganatham Chetty, Senior Advocate (*A. V. Rangam*, Advocate, with him), for Appellants (In all the Appeals).

R. Gopalakrishnan, Advocate, for Respondent (In C.A. No. 11 of 1963).

S. V. Gupte, Additional Solicitor-General of India (*R. H. Dhebar*, Advocate, with him), for Interveners Nos. 1 and 2.

M. C. Setalvad and *N. S. Bindra*, Senior Advocates (*R. H. Dhebar*, Advocate, with them), for Intervener No. 3.

G. C. Kasliwal, Advocate-General, for the State of Rajasthan (*R. H. Dhebar* and *B. R. G. K. Achar*, Advocates, with him), for Intervener No. 4.

The Judgment of the Court was delivered by

Shah, J.—Whether sections 2 and 3 of the Madras Lignite (Acquisition of Land) Act XI of 1953 which seek to amend the Land Acquisition Act I of 1894 in

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*C.As. Nos. 6 to 12 of 1963. 3rd March, 1964.

* (1959) 2 M.L.J. 402.

their application to acquisition of lignite bearing lands are invalid because they infringe the fundamental right under Article 31 of the Constitution of owners of lands whose property is to be compulsorily acquired is the only question which falls to be determined in this group of appeals.

Investigations conducted by the Geological Survey of India in 1947 revealed deposits of lignite in the South Arcot District of the State of Madras, and exploratory mining operations were commenced by the Government of Madras. Discovery of deposits of lignite led to speculation in lands. On 6th October, 1948, the Government of Madras issued a "Press Note" announcing that the Government proposed to undertake legislation reserving power to compel any person who had purchased land on or after a date to be prescribed in 1947 in the lignite bearing areas to sell such lands to the Government at the rate at which it was purchased. The Government also advised the owners of the lignite bearing lands in the Vriddhachalam and Cuddalore taluks not to sell their lands to speculators. On 7th January, 1953, the Government of Madras published a Bill to amend the Land Acquisition Act I of 1894 in certain respects. The Bill was duly passed by the State Legislature on 2nd June, 1953, and received the assent of the President. It was published as an Act on 10th June, 1953, and came into force on 20th August, 1953. By this Act substantially three provisions are made :

(1) that compensation for acquisition of lignite bearing lands under the Land Acquisition Act as amended, is to be assessed on the market value of the land prevailing on 28th April, 1947, and not on the date on which the notification is issued under section 4 (1) of the Land Acquisition Act;

(2) power is reserved under section 17 of the Land Acquisition Act to take possession in cases of urgency of lands for the purpose of working lignite mines in the areas in which the Madras Lignite (Acquisition of Land) Act XI of 1953 extends ; and

(3) in assessing the market value of the land on 28th April, 1947, value of any non-agricultural improvements on the land commenced, made or effected after that date are not to be taken into account, even if such improvements were made before the date of publication of the notification under section 4 (1) of the Land Acquisition Act.

Pursuant to this Act, notifications under section 4 (1) of the Land Acquisition Act were issued between the months of January and May, 1957, notifying for acquisition, certain lands in Vriddhachalam taluk of the South Arcot District. These notifications were followed by notifications under section 6 of the Land Acquisition Act. Between the months of May and November, 1957 the Land Acquisition Officer made his awards under section 11 of the Land Acquisition Act assessing compensation on the basis of market value of the lands on 28th April, 1947, and ignoring in the computation of compensation the value of houses built or other non-agricultural improvements made on the land since that date. The owners of the lands affected by these awards submitted petitions under Article 226 of the Constitution to the High Court of Judicature at Madras challenging the validity of the awards on the ground that the provisions of Madras Act XI of 1953 violated the fundamental right of the owners of the lands under Article 31 (2) of the Constitution. They claimed that the Land Acquisition Officer was bound to award compensation for acquisition of their lands and buildings at the market value prevailing on the respective dates of notifications under section 4 (1) and that awards valuing the lands at the market rate prevailing on 28th April, 1947, and excluding the value of buildings constructed after that date and trees thereon were without jurisdiction. The petitioners accordingly claimed that writs of *mandamus* be issued directing the State of Madras and the Land Acquisition Officers to refrain from taking possession of the lands and buildings from the petitioners without payment of adequate compensation and for other appropriate relief. The High Court upheld the contention of the petitioners and declared that the awards made on the basis of the provisions of Madras Act XI of 1953 could not be sustained. Against the order passed by the High Court, these

appeals have been preferred by the State of Madras, with certificate of fitness granted by the High Court under Article 132 of the Constitution.

The Madras Act XI of 1953 makes an important departure from the scheme of the Land Acquisition Act I of 1894. Under the Land Acquisition Act I of 1894, a person interested in any land compulsorily acquired is entitled to the market value of his interest in the land at the date of the publication of the notification under section 4 (1), and this compensation includes the value of the improvements agricultural and non-agricultural, made in the land up to the date of the notification. By Madras Act XI of 1953, compensation made payable for compulsory acquisition of land is the value of the land on 28th April, 1947, together with the value of any agricultural improvements made thereon after that date and before publication of the notification under section 4 (1). The result of the Madras Act is therefore to freeze for the purpose of acquisition the prices of land in the area to which it applies, and the owners are deprived of the benefit of appreciation of land values since 28th April, 1947, whenever the notification under section 4 (1) may be issued and also of non-agricultural improvements made in the land after 28th April, 1947. Departure from the provisions of the Land Acquisition Act is challenged as illegal on the ground that it deprives the owner of the land of just compensation for compulsory acquisition of his property.

Madras Act XI of 1953 was passed before the Constitution (Fourth Amendment) Act, 1955 was enacted, and we have to deal with the question of the validity of the Act in the light of the constitutional provisions contained in Article 31 before the constitutional amendment. We may make it clear that for the purpose of this judgment, we express no opinion on the question whether it is possible by enacting legislation after the amendment of Article 31(2) by the Constitution (Fourth Amendment) Act, 1955 (which is not given any retrospective operation) to provide that compensation for compulsory acquisition of land may be fixed on the basis of market value prevailing on a date anterior to the date of the issue of the notification under section 4 (1). Article 31 before it was amended by the Constitution (Fourth Amendment) Act, 1955, by its clauses (1) and (2) provided :

" (1) No person shall be deprived of his property save by authority of law.

(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given. "

It was held by this Court in *Chiranjit Lal Chowdhuri* v. *Union of India and others*[1], and *The State of West Bengal* v. *Subhodh Gopal Bose and others*[2], that clauses (1) and (2) of Article 31 relate to the same subject of " eminent domain ". By Article 31 therefore every person was protected against deprivation of his property save by authority of law, and the law authorising taking possession or acquisition of property for public purposes had to fix the quantum of compensation, or to specify principles on which compensation was to be determined for the property taken possession of or acquired. Power to legislate in respect of compenesation for acquisition and requisitioning of property was contained in Entry 42, List III of the Seventh Schedule and read as follows :

"Principles on which compensation for property acquired or requisitioned for the purpose of the Union or of a State or for any other public purpose is to be determined, and the form and the manner in which such compensation is to be given. "

The Constitution therefore conferred by Article 31 (2) a fundamental right upon every person, protecting his property against compulsory acquisition otherwise than by authority of law, and without just indemnification for loss suffered by him. In *The State of West Bengal* v. *Mrs. Bela Banerjee and others*[3], this Court observed that when under Entry 42, List III the Legislature was given discretionary power to

1. (1951) S.C.J. 29 : (1950) S.C.R. 869.
2. (1954) S.C.J. 127 : (1954) S.C.R. 587.
3. (1954) S.C.J. 95 : (1954) 1 M.L.J. 162; (1954) S.C.R. 558.

lay down the principles which should govern determination of the amount to be given to the owner of the property appropriated, such principles must ensure that what is determined as payable must be a just equivalent of what the owner has been deprived of, and that subject to this basic limitation the Constitution allowed free play to the legislative judgment as to what principles should guide the determination of the amount payable. The Court therefore held that the West Bengal Land Development and Planning Act, 1948, which was enacted primarily for the settlement of immigrants who had migrated into West Bengal due to communal disturbances in East Bengal and which by section 8 provided that the compensation to be awarded for compulsory acquisition to the owner of the land was not to exceed the market value on 31st December, 1946, was *ultra vires* the Constitution and void under Article 31 (2) of the Constitution. It was observed at page 564 :

> "Turning now to the provisions relating to compensation under the impugned Act, it will be seen that the latter part of the proviso to section 8 limits the amount of compensation so as not to exceed the market value of the land on 31st December, 1946, no matter when the land is acquired. Considering that the impugned Act is a permanent enactment and lands may be acquired under it many years after it came into force the fixing of the market value on 31st December, 1946, as the ceiling on compensation without reference to the value of the land at the time of the acquisition is arbitrary and cannot be regarded as due compensation in letter and spirit with the requirement of Article 31(2)."

That principle must apply in adjudging the validity of Madras Act XI of 1953. It may be assumed that 28th April, 1947, was the date on which lignite deposits were discovered in the areas to which the Act is extended. But there is no true relation between the acquisition of the lands in these cases and fixation of compensation based on their value on the market rate prevailing on 28th April, 1947. Fixation of compensation for compulsory acquisition of lands notified many years after the date, on the market value prevailing on the date on which lignite was discovered is wholly arbitrary and inconsistent with the letter and spirit of Article 31 (2) as it stood before it was amended by the Constitution (Fourth Amendment) Act, 1955. If the owner is by a constitutional guarantee protected against expropriation of his property otherwise than for a just monetary equivalent, it would be impossible to hold that a law which authorises acquisition of land not for its true value, but for value frozen on some date anterior to the acquisition, on the assumption that all appreciation in its value since that date is attributable to purposes for which the State may use the land at some future date, must be regarded as infringing the fundamental right.

Counsel for the State of Madras relying upon the following observation of is Patanjali Sastri, C.J., in *Mrs. Bela Banerjee's case*[1] at page 564 :

> "The fixing of an anterior date for the ascertainment of value may not, in certain circumstances be a violation of the constitutional requirement as, for instance, when the proposed scheme of acquisition becomes known before it is launched and prices rise sharply in anticipation of the benefits to be derived under it, but the fixing of an anterior date, which might have no relation to the value of the land when it is acquired, may be, many years later, cannot, but be regarded as arbitrary."

submitted that a law which merely fixes the market value on a date anterior to the date on which the owner is expropriated of his land, as determinative of the market value on which the compensation is to be based, cannot without further enquiry be regarded as infringing Article 31 (2) of the Constitution. In our view this observation cannot assist the State of Madras in saving the provisions of Madras Act XI of 1953 from the vice of infringing the constitutional guarantee under Article 31 (2) of the Constitution. The right which is guaranteed is undoubtedly the right to a just indemnification for loss, and appreciation in the market value of the land because of the proposed acquisition may in assessing compensation be ignored. Even the Land Acquisition Act provides for assessment of compensation on the basis of market value of the land not on the date on which interest of the owner of the land is extinguished under section 16, but on the basis of market value prevailing on the date on which the notification under section 4 (1) is issued. Whether this rule in all cases irrespective of subsequent development ensures just indemnification of expropriated owner so as to be immune from attack, does call for comment in this case. But any principle for determination of compensation denying to the owner all increments in value between a fixed date and the date of issue of the notification

1. (1954) S.C.J. 95: (1954) 1 M.L.J. 162: (1954) S.C.R. 558.

under section 4 (1), must *prima facie*, be regarded as denying to him the true equivalent of the land which is expropriated and it is for the State to show that fixation of compensation on the market value on an anterior date does not amount to a violation of the constitutional guarantee. No materials have been placed by the State before this Court which would support any such case.

It is true that the Province of Madras had issued a "Press Note" in 1948 announcing that the Government proposed to undertake legislation reserving the power to compel any person who had purchased land in the lignite bearing areas to sell such land to them at the rate at which it was purchased. The only intimation given thereby to the owners of lauds was that the Government may undertake legislation for the purpose of purchasing land at the price at which speculators in land may have purchased them. There is no evidence that any scheme for acquisition of land for mining of lignite was prepared in 1947 by the Government of Madras. The mining operation in 1947 must, in the very nature of things, have been exploratory. The Staement of Objects and Reasons for the Act clearly discloses that initially mining operations were started by the Government on a small area. Assuming that in appropriate cases, fixation of a date anterior to the publication of the notification under section 4 (1) for ascertainment of market value of the land to be acquired, may not always be regarded as a violation of the constitutional guarantee, in the absence of evidence that compensation assessed on the basis of market value on such anterior date, awards to the expropriated owner a just monetary value of his property at the date on which his interest is extinguished, the provisions of the Act arbitrarily fixing compensation based on the market value at a date many years before the notification under section 4 (1) was issued, cannot be regarded as valid. It is a matter of common knowledge that since the termination of hostilities in the last World War there has been an upward tendency in land values resulting in appreciation in some areas many times the original value of lands. No attempt has been made by the State to prove that appreciation in the market value of lands in the area since April, 1947 was solely attributable to a scheme of land acquisition of lignite bearing lands. To deny to the owner of the land compensation at rates which justly indemnify him for his loss by awarding him compensation at rates prevailing ten years before the date on which the notification under section 4 (1) was issued amounts in the circumstances to a flagrant infringement of the fundamental right of the owner of the land under Article 31 (2) as it stood when the Act was enacted.

The validity of the provisions relating to fixation of compensation had to be adjudged in the light of the extent of the constitutional protection guaranteed at the date when the Act was brought into operation, and any restriction of the constitutional protection by subsequent amendment of Article 31 (2) which has not been given retrospective effect, must be entirely ignored.

The provision which denies to the owner of land compensation for non-agricultural improvements made by him since 28th April, 1947, also infringes the protection of Article 31 (2). Under section 3 (*a*) of the Land Acquisition Act "land" is defined as including benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth, and when under section 4 (1) land is notified for acquisition, the acquisition is of the entirety of the interest of the owner in the land including underground rights if any, crops, trees and superstructures. By the Madras Act the owner is deprived of the value of all non-agricultural improvements including the value of non-agricultural buildings, erected on the land after 28th April, 1947. It is not clear whether the non-agricultural buildings constructed after the specified date are forfeited to the State on acquisition, or the owner is entitled to remove them. In either case the owner is deprived of just value of his land including the superstructure, of which he is expropriated. Denial to the owner of the land of the value of the structures constructed by him (even of those put up after 28th April, 1947, with the knowledge that the Government may undertake legislation for the purpose of compulsory acquisition of the land) would still be denying to him just compensation for the loss suffered by him on account of compulosry acquisition of his holding, and would amount to infringement of Article 31 (2) of the Constitution.

We are therefore of the view that the provisions which require the Land Acquisition Officer and the Court to assess compensation of the land compulsorily acquired only on the market value of the land on 28th April, 1947, together with the value of agricultural improvements on the land commenced, made or effected after that date, and before the date of the publication of the notification under section 4 (1), without taking into consideration the value of non-agricultural improvements made after that date, must be regarded as invalid.

We are not called upon to express any opinion on the question whether the power reserved under section 17 of the Land Acquisition Act as amended by section 2 of Madras Act XI of 1953 to take possession of lands under the emergency clause for the purpose of working lignite mines in the areas to which the Madras Lignite (Acquisition of Land) Act, 1953, extends is invalid. No argument has been advanced by either side before us on this question. Nor was the High Court called upon to consider the validity of that provision.

The appeals therefore fail and are dismissed. The respondents in this group of appeals, except in Appeal No. 11 of 1963, have not appreared in this Court. Therefore in Appeal No. 11 of 1963 alone, the State of Madras will pay the costs of the respondents. There will be no order as to costs in other appeal.

K.S. *Appeals dismissed.*

SUPREME COURT OF INDIA.
(Criminal Appellate Jurisdiction.)

PRESENT:—P. B. GAJENDRAGADKAR, K. N. WANCHOO AND K. C. DAS GUPTA, JJ.

State of Andhra Pradesh .. *Appellant* *

v.

N. Venugopal and others .. *Respondents.*

Madras District Police Act (XXIV of 1859), *section* 53—*Protection against prosecution beyond three months—Limits under Madras Police Standing Order,* 145—*If has the force of law—Non-compliance with the order in investigation—Effect.*

If the act complained of is wholly justified by law, it would not amount to an offence at all in view of the provisions of section 79 of the Indian Penal Code. Many cases however may arise where in acting under the provisions of the Police Act or other law conferring powers on the police the police officer or some other person may go beyond what is strictly justified in law. Though section 79 of the Indian Penal Code will have no application to such cases; section 53 of the Police Act will apply. But section 53 applies to only a limited class of persons. So, it becomes the task of the Court, whenever any question whether this section applies or not arises to bestow particular care on its decision. In doing this it has to ascertain first what act is complained of and then to examine if there is any provision of the Police Act or other law conferring powers on the police under which it may be said to have been done or intended to be done. The Court has to remember in this connection that an act is not " under " a provision of law merely because the point of time at which it is done coincides with the point of time when some act in the exercise of the powers granted by the provision or in performance of the duty imposed by it. To be able to say that an act is done " under " a provision of law, one must discover the existence of a reasonable relationship between the provisions and the act. In the absence of such a relation the act cannot be said to be done " under " the particular provision of law. These principles apply equally to the decision of the question whether the acts complained of were " intended to be done " under the provisions of the Police Act or some other law conferring powers on the police.

Section 161 of the Criminal Procedure Code does not authorise the Police Officers to beat or confine a person with a view to induce him to make a statement.

In the instant case it cannot possibly said that the acts complained of (beating and confining a person during investigation and sending him away in a injured condition of which he died) were done or intended to be done under any provision of the Police Act or the Criminal Procedure Code or any other law conferring powers on the Police. Section 53 of the Police Act had therefore no application to the case.

The High Court when it held that the conviction had to be set aside on the preliminary ground that prosecution was commenced in contravention of section 53 of the Police Act it might have chosen not to examine the merits of the case. When it did choose, however, to do so, it was necessary that this should be done with proper care, and not in a cursory or casual manner as was done in the instant case.

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* Crl.A. No. 142 of 1961. 9th May, 1963.

Madras Police Standing Order 145 cannot be said to have the force of law and further requirement of this Order was merely directory and not mandatory. Non-compliance with the provisions of this Order therefore does not make the investigation of the case illegal.

Appeal by Special Leave from the Judgment and Order dated 31st August, 1960, of the Andhra Pradesh High Court in Criminal Appeal No. 551 of 1958.†

A. S. R. Chari, Senior Advocate (*K. R. Chaudhuri* and *P. D. Menon*, Advocates, with him), for Appellant.

N. N. Keswani, Advocate (*Amicus Curiae*), for Respondents.

The Judgment of the Court was delivered by

Das Gupta, J.—The three respondents, Venugopal, Rangaswamy and Subbaiah were tried along with one Mittala Kamal Sab by the Session Judge, Anantapur Division, on a number of charges. Kamal Sab was acquitted of all the charges against him, but these three respondents were convicted of several offences. All three of them were convicted under sections 348, 331, and 201 read with section 109 of the Indian Penal Code. Venugopal was further convicted under section 343 of the Indian Penal Code. For the offence under section 348 the respondents were sentenced to suffer rigorous imprisonment for two years; for the offence under section 331 of the Indian Penal Code each of them was sentenced to rigorous imprisonment for five years; for the offence under section 201 read with section 109 of the Indian Penal Code they were sentenced to rigorous imprisonment for three years each. Venugopal was sentenced to one year's rigorous imprisonment under section 343 of the Indian Penal Code. All of them were acquitted of the charge under section 302 read with section 34 of the Indian Penal Code. The sentences imposed on them were directed to run concurrently. These orders of conviction and sentence were set aside by the High Court of Andhra Pradesh in appeal and the three respondents have been acquitted of all the charges. Against that decision the State of Andhra Pradesh has filed the present appeal after obtaining Special Leave from this Court.

Of the three respondents, Venugopal was the Sub-Inspector of Police, Vempalli Police Station, in Cuddapah District from 20th July, 1956 to 22nd February, 1957; Rangaswamy was a Head Constable attached to the same Police Station from 4th May, 1955 to 20th February, 1957; Subbaiah was a Police Constable at that Police Station from 10th April, 1955 to 20th February, 1957. On 21st July, 1952 Mittala Kamal Sab, a resident of Vempalli Town lodged at the Vempalli Police Station an information of house-breaking and theft in his house. After investigation a charge-sheet was submitted by the police against one Patra Obanna and three other persons. Those three were arrested and tried and convicted on 31st October, 1952; but Patra Obanna remained absconding and the case against him remained pending in the Magistrate's Court. After sometime the Magistrate wrote to the District Superintendent of Police of Anantapur, requesting him either to withdraw the case or to try and arrest Patra Obanna.

Thereafter, Venugopal, who was then the Vempalli Sub-Inspector of Police, took action in this matter and his attempt to arrest Patra Obanna met with success. Patra Obanna was actually arrested on 6th January, 1957. On the same date on being informed by him that he had given the gold gajjalu which formed part of the stolen property to a person in Kadiri Taluk, Venugopal proceeded to Kadiri Police Station. On the night of 6th January, Venugopal, accompanied by Constables of the Kadiri Police Station and Rangaswamy and Subbiah, who had come with him to Kadiri went to Dasaravandlapalli in Gandlapenta Police Station and there on the identification of Patra Obanna as the person to whom he had given the gold gajjalu took one Arige Ramanna into custody. The police party then returned with Arige Ramanna to Kadiri Police Station. Less than three days later Arige Ramanna was found lying dead not far from the house of one Sugali Baginigadu, in Udmulagutta Thanda, in Kadiri village. There were a number of injuries on the body. The prosecution case is that these injuries had been caused by the three

† (1961) 1 An. W.R. 1 : (1961) M.L.J. (Crl.) 1 (F.B).

respondents acting in concert for the purpose of extorting from him information which might lead to the detection of an offence and restoration of stolen property. It is also the prosecution case that for this purpose these three respondents wrongfully confined Arige Ramanna in a room at the Kadiri Police Station and it was there when he was thus confined that the injuries were caused. The prosecution case further is that when after infliction of the injuries Arige Ramanna appeared to be in a bad state these respondents had him removed from the Police Station and his body thrown at the place where it was ultimately found with the intention of screening themselves from punishment.

As to the events which led to such acts by the respondenets, the prosecution story is that Arige Ramanna had on being interrogated at the Kadiri Police Station given information that he had sold the gajjalu to Appalla of Nallasanivandlappalli. Following up this information the three respondents accompanied by Patra Obanna and Arige Ramanna went to that village and questioned Nallasani Appalla. One gold gajjalu was seized from his house and to check on Arige Ramanna's statement that this had been sold by him to Appalla in the presence of Fakruddin of Kataruppalli, the Sub-Inspector tried to contact Fakruddin. Fakruddin was found at Madanappalli on 8th January, 1957 ; but he denied any knowledge about the sale of gold gajjalu by Arige Ramanna to Appalla. The respondent Venugopal then returned to Kadiri Police Station bringing Arige Ramanna and Appalla with him. It was then the early morning of 9th January, 1957. Both Arige Ramanna and Appalla were then taken by Venugopal into the Sub-Inspector's room at Kadiri Police Station. Subbaiah and Rangaswamy also went into the room. There, after some further interrogation Arige Ramanna was beaten up by Subbaiah, Rangaswamy, and Kamal Sab, who was the complainant in the theft case, under the instructions of Venugopal.

These three respondents as well as Kamal Sab pleaded not guilty. We are not concerned with the case of Kamal Sab. He was acquitted by the Session Judge and after the State's appeal against the acquittal order was dismissed by the High Court the State has not sought to appeal against that order of dismissal.

The defence of these three respondents was that they had nothing to do with the injuries that were found on Arige Ramanna's body. The fact that Arige Ramanna was taken into custody and brought by them to the Kadiri Police Station was not disputed, though they dispute the correctness of the prosecution story that this happened on 6th January, 1957. They do not also deny the visit to Appalla and the seizure of a gold gajjalu from his house and the visit thereafter to Madanappalli to meet Fakruddin nor the fact that Fakruddin denied having witnessed any sale of gold gajjalu. Their case however is that after the return from Madanapplli both Arige Ramanna and Appalla were asked to go away and they went away and did not come to the Police Station at all. After this they say they as well as Obanna came to the Police Station and slept there. According to them, the whole story of Arige Ramanna being taken into the Sub-Inspector's room and being beaten up there and then being taken away from there is entirely false.

On a consideration of the evidence, oral and documentary, and the statements of the accused persons the Sessions Judge believed the prosecution case about the confinement and beating up of Arige Ramanna by these appellants and that when Arige Ramanna was in a bad state after receiving the injuries they got him removed from the Police Station. He also rejected the defence contention that the investigation in the present case had not been made in accordance with the law. Accordingly, the Session Judge convicted these respondents, as already stated, under sections 348, 331 and 201 read with section 109 of the Indian Penal Code. The learned Judge also held that as after the arrest of Arige Ramanna on the night of 6th January, 1958 he was not sent to the Magistrate and kept in restraint for three days, the respondent Venugopal committed the further offence under section 343 of the Indian Penal Code. He found that the case against Kamal Sab had not been proved and acquitted him of all the charges.

When the appeal preferred by Venugopal, Rangaswamy, and Subbaiah came up for hearing before the High Court of Andhra Pradesh a preliminary point was raised on their behalf that the prosecution was barred by reason of the provisions of section 53 of the Madras District Police Act, 1859 (hereinafter referred to as the " Police Act "). Thereupon Basi Reddy, J., before whom this point was raised framed the following question :

" In the circumstances of this case, is the prosecution of the appellants barred by limitation by reason of the provision of section 53 of the Madras District Police Act, 1859 ? "

and referred it for determination by a Division Bench of two Judges. The Division Bench to whom the case was referred, referred this question and a further question framed by them, *viz.*

In what circumstances, the bar of limitation prescribed by section 53 of the Madras District Police Act would be available to an accused officer ?",

for determination by a Full Bench. After discussing the relevant legal provisions and authorities the Full Bench disposed of the matter in these words :—

" We would therefore answer the first question referred to us by saying that the bar of limitation prescribed by section 53 of the Act would be available to an accused officer only when the act complained of has been committed in the discharge of his official duties. We have already laid down that the question as to whether a particular act would be regarded as having been done in the discharge of one's official duties would have to be determined on the facts and particular circumstances of the case. It is unnecessary for us to answer the second question. This will be decided by a Single Judge. "

The appeal then came to be heard by Mr. Justice Anantanarayana Ayyar. The learned Judge was of opinion, after considering the decision of the Full Bench and certain observations in some other cases, that if the police officers were alleged to have committed the acts complained of " when " they were investigating into the cases of house breaking and theft, section 53 of the Police Act would apply. Observing that there was no doubt or dispute about the fact that these officers were investigating the case of house-breaking and theft officially at all material times they were alleged to have committed the offences which formed the subject-matter of the charges he concluded, that as the prosecution was made beyond the period prescribed in section 53 of the Police Act they were entitled to an acquittal. He proceeded however to consider the case also on the merits and came to the conclusion that on facts also there was room to doubt the guilt of these officers on the charges. In this view of the law and facts the learned Judge set aside the orders of conviction and sentence passed by the Trial Court and acquitted these three respondents of the charges framed against them. In our opinion, the High Court is clearly wrong in thinking that the prosecution was barred by section 53 of the Police Act. That section provides in the first place for a period of limitation for certain actions and prosecutions and makes certain other provisions in respect of civil actions with which we are not concerned. The actions and prosecutions for which the limitation is prescribed can be best understood from the actual words used by the Legislature, which are these :—

" All actions and prosecutions against any person, which may be lawfully brought for anything done or intended to be done under the provisions of this Act or under the provisions of any other law for the time being in force conferring powers on the police shall be commenced within three months after the act complained of shall have been committed and not otherwise."

It is plain that in order that any person against whom a prosecution has been launched can get the benefit of the three months' period of limitation thus prescribed, it must appear either, (i) that the act complained of was done under the provisions of the Police Act or (ii) the act complained of was done under the provisions of some other law in force conferring powers on the police or (iii) the act complained of was intended to be done under the provisions of the Police Act, *i.e.*, though strictly speaking the act was not done under the provisions of the Act, the intention of the accused in doing the act was to act under the provisions of the Police Act or (iv) the act complained of was intended to be done under the provisions of some other law in force conferring powers on the police *i.e.*, though the act was strictly speaking not done under the provisions of such other law the intention of the accused in doing the act was to act under such provisions.

The Police Act contains several provisions under which the police officers or other persons may act or intend to act. Section 6 vests in police authorities appointed under the Act all powers not inconsistent with the provisions of the Act which up to the passing of the Act belonged by law to the existing police authorities. Section 7 confers full powers of a Magistrate on the Inspector-General of Police and authorises the State Government to vest the District Superintendents of Police with all or any of these powers. Under section 9 the Inspector-General may from time to time frame rules and regulations *inter alia* for collecting and communicating intelligence and information; section 21 describes the duty of every police officer to be

" to use his best endeavours and ability to prevent all crimes, offences and public nuisances; to preserve the peace; to apprehend disorderly and suspicious characters; to detect and bring offenders to justice; to collect and communicate intelligence affecting the public peace; and promptly to obey and execute all orders and warrants lawfully issued to him."

Section 42 which is the next section in the Act—the original sections 22 to 43 having been repealed by the Central Act XVII of 1862—empowers any police officer above the rank of a Constable or any member of the Madras Fire Service above the rank of a Fireman to do a number of things. These include the closure of a street or passage in or near which any fire is burning and the breaking into or through, or pulling down or using the passage of houses or other appliances any premises for the purpose of extinguishing the fire.

The effect of section 53 of the Police Act is that all prosecutions whether against a police officer or a person other than a police officer (*e.g.* a member of the Madras Fire Service, above the rank of Fireman acting under section 42 of the Act) must be commenced within three months after the act complained of, if this act is one which has been done or intended to be done " under " any of the provisions detailed above. The protection of section 53 is not confined however only to acts done or intended to be done under the provisions of the Police Act. It extends to acts done or intended to be done under the provisions of any other law conferring powers on the police. One such law is the Code of Criminal Procedure which confers numerous powers on the police in respect of arrest, search and investigation. Among other laws conferring powers on the police may be mentioned the Opium Act, the Excise Act, the Petroleum Act, etc.

Any prosecution in respect of any act done or intended to be done under the provisions of any of these laws has also to be commenced within three months of the act complained of. It is clear that if in any of these cases the prosecution is commenced beyond three months after the act complained of, it will be the duty of the Courts to dismiss the same. But it is equally clear that unless the act complained of appears to have been done or intended to be done " under " the provisions of the Police Act or of the other laws conferring powers on the police the protection of section 53 will not be available. Thus, if the prosecution is for an offence under section 341 of the Indian Penal Code said to have been committed by the act of closing a street or passage in or near which a fire is burning in exercise of powers under section 42 (*b*) of the Police Act, or for an offence under section 426 of the Indian Penal Code said to have been committed by the pulling down of a house for the purpose of extinguishing a fire, under section 42 (*c*) of the Police Act, the prosecution must fail unless brought within three months of the act complained of. So also if a police officer is prosecuted for an offence under section 323 of the Indian Penal Code said to have been committed in making an arrest, the prosecution must fail unless commenced within three months of the act complained of.

It is easy to see that if the act complained of is wholly justified by law, it would not amount to an offence at all in view of the provisions of section 79 of the Indian Penal Code. Many cases may however arise where in acting under the provisions of the Police Act or other law conferring powers on the police the police officer or some other person may go beyond what is strictly justified in law. Though section 79 of the Indian Penal Code will have no application to such cases; section 53 of the Police Act will apply. But section 53 applies to only a limited class of persons. So, it becomes the task of the Court, whenever any question whether this section

applies or not arises to bestow particular care on its decision. In doing this it has to ascertain first what act is complained of and then to examine if there is any provision of the Police Act or other law conferring powers on the police under which it may be said to have been done or intended to be done. The Court has to remember in this connection that an act is not "under" a provision of law merely because the point of time at which it is done coincides with the point of time when some act in the exercise of the powers granted by the provision or in performance of the duty imposed by it. To be able to say that an act is done "under" a provision of law, one must discover the existence of a reasonable relationship between the provisions and the act. In the absence of such a relation the act cannot be said to be done "under" the particular provision of law.

This aspect of the matter was emphasized by this Court recently in *Virupaxappa Veerappa Kadampur* v. *The State of Mysore*[1], when examining the language of a similar provision in the Bombay District Police Act.

These principles apply equally to the decision of the question whether the act complained of was "intended to be done" under the provisions of the Police Act or some other law conferring powers on the police. When we apply these principles to the facts of the present case we look in vain for any provision of law—whether under the Police Act or under some other law—under which the acts complained of, *viz.*, beating a person suspected of a crime or confining him or sending him away in an injured condition can be said to have any relation. Mr. Keswani tried to say—it is fair to him to state—rather faintly—that these acts were done under the provisions of section 161 of the Code of Criminal Procedure. That section empowers any police officer investigating a crime or any other police officer acting on his requisition to examine orally any person supposed to be acquainted with the facts and circumstances of the case. The section further provides that such person shall be bound to answer all questions relating to such case put to him by such officer, other than questions answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture. By no stretch of imagination can it be said that the provisions of this section authorise the officer examining a person to beat him or to confine him for the purpose of inducing him to make a particular statement. It is worth noticing here section 163 of the Code of Criminal Procedure. The first sub-section of section 163 prohibits any police officer from making any inducement, threat or promise for the purpose of obtaining a statement. The second sub-section provides that no police officer shall prevent by caution or otherwise any person from making a statement which he may be disposed to make on his own free will. The provisions of section 163 thus emphasize the fact that section 161 of the Code of Criminal Procedure does not authorise the police officers to beat or to confine a person with a view to induce him to make a statement.

The act of beating or the act of confining was, it is true alleged to be done at a time when Venugopal was engaged in investigation. But it is not possible to see what reasonable connection these acts had with the process of investigation. Nor can one see how the act of sending away the injured person had any relation to the process of investigation.

The High Court fell into the error of thinking that whatever a police officer does to a person suspected of a crime at a time when the officer is engaged in investigating that crime should be held to be done in the discharge of his official duties to investigate and as such under the provisions of the law that imposed this duty on him. This view is wholly unwarranted in law.

In our opinion, it cannot possibly be said that the acts complained of in the present case were done or intended to be done under any provision of the Police Act or the Code of Criminal Procedure or any other law conferring powers on the police. Section 53 of the Police Act had therefore no application to this case.

After holding that the prosecution was barred under section 53 of the Police Act, the High Court still proceeded to consider the merits of the case and recorded a

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1. Crl.A. No. 144 of 1961, decided on 9th November, 1962.

conclusion that the evidence left room for doubt as regards the guilt of the accused on the different charges. When the High Court held that the conviction had to be set aside on the preliminary ground that the prosecution had been commenced in contravention of section 53, it might have chosen not to examine the merits of the case. When it did choose, however, to do so, it was necessary that this should be done with proper care. We are constrained to say that the examination of the evidence was done by the High Court in what can only be called a cursory or casual manner. It has been necessary therefore for us to try to assess the evidence for ourselves.

But before we proceed to the discussion of the evidence we must consider a contention raised on behalf of the respondents that the very trial was vitiated by the fact that the investigation was not done in accordance with law. The argument is that under the Madras Police Standing Orders, the investigation in cases against the police for torture and causing death has to be conducted by a person of the rank of Assistant or Deputy Superintendent of Police or by the Sub-Divisional Magistrate. In the present case, though the initial investigation was conducted by the Sub-Divisional Magistrate, Penkondu, it was taken up from him by an Inspector of the Police, C.I.D., Hyderabad. It was this Inspector of Police who completed the investigation and submitted the charge-sheet. It has to be noticed that the respondents do not say that the investigation was not in accordance with the provisions of the Code of Criminal Procedure. Their case, as raised before the Sessions Court, apparently at the time of argument and again repeated here is that the investigation by the Inspector contravened the Madras Police Standing Orders.

Order No. 145 of the Madras Police Standing Orders prescribes the procedure in respect of charges of torture or of death or grievous hurt against a police officer. This order, it may be mentioned, superseded the previous Order No. 157 on the subject and was in force in 1957. The main features of the procedure when the case occurs in the mufassal in the State of Madras are that :—

(1) A Gazetted Police Officer on hearing of such an occurrence on a complaint made to him or otherwise should immediately start an informal investigation but when an information is received by a police officer below the rank of Assistant or Deputy Superintendent of Police, he should instead of making an investigation himself report the case to his Assistant or Deputy Superintendent of Police. In either case a report should be sent to the Revenue Divisional Officer ;

(2) The Revenue Divisional Officer should conduct an informal enquiry to see whether there are grounds for launching a criminal prosecution and to fix the responsibility on individual officers ;

(3) Where a complaint has been filed in the Court of a Judicial Magistrate as regards the occurrence, the Revenue Divisional Officer should after arriving at his own findings keep them confidential and decide on the further course of action in the light of the judicial decision when it is available ;

(4) When no complaint has been filed in the Court of the Judicial Magistrate the Revenue Divisional Officer should after completing the investigation submit his report to the Collector. The Collector shall where necessary issue instructions for laying a formal complaint by the Revenue Divisional Officer before the Court of the First Class Judicial Magistrate.

It is contended that the provisions of the Code of Criminal Procedure for investigation of crime are superseded by this Standing Order and so the investigation by the Inspector, C.I.D., was illegal. In our opinion, there is no substance in this argument. It appears to us that this Standing Order is nothing more than administrative instructions by the Government of Madras and has not the force of law. It is worth noticing in this connection that in the Madras Police Standing Orders as published by the Government of Madras it is mentioned in the Prefatory Note that the orders marked with asterisk were issued by the Inspector-General of Police under section 9 of the Madras District Police Act. The Standing Order No. 145 is not marked with asterisk and it could be safely held that it was not issued under sec-

tion 9 of the Madras District Police Act. The Marginal Note against the order as printed shows that it was issued by a Government Order of the Home Department dated 12th October, 1955. It does not appear that this was done under any statutory authority. There can be no doubt that quite apart from the fact that the Government may and often should issue instructions to its officers, including police officers, such instructions have not however the authority of law. We are not satisfied therefore that the Standing Order No. 145 had the force of law.

We are further of opinion that, in any case, the requirement of this order was mereby directory and not mandatory. Non-compliance with the provisions of this order therefore does not make the investigation of the case illegal.

It is also to be mentioned that no objection that the investigation had been conducted in violation of the Standing Orders appears to have been taken at any stage earlier than the trial in the Sessions Court. It will be proper to hold therefore on the authority of *Rishbud's case*[1] that even if the provision that the investigation had to be held and completed by a Magistrate had the force of law and was mandatory the trial would not be rendered invalid unless it was shown that miscarriage of justice had been caused on account of the illegal investigation. Learned Counsel was not able to show how the accused were in any way prejudiced by reason of the fact that the investigation was completed by the Inspector of Police. We have therefore no hesitation in rejecting the contention raised on behalf of the respondent that the trial was bad in law because investigation was completed by an Inspector of Police. *See Munnalal's case*[2].

Turning now to the evidence in the case we find it proved by unimpeachable evidence, and also undisputed fact that Arige Ramanna was taken away from his house by these respondents and was with them on 8th January, 1957. It is also clearly proved and is not disputed that Arige Ramanna's dead body was found on 9th January, lying by the side of a hut in Sugali Tanda. The report of the Assistant Civil Surgeon who held the post-mortem examination of the body on 11th January, 1957, shows that the body bore nine injuries. Seven of these were contusions on different parts of the body and two abrasions. One of the contusions on the right parietal scalp had the internal injury of the congestion of the brain with capillary haemorrhage corresponding to it. The doctor's report shows that this injury would be necessarily fatal. The question is: Has the prosecution been able to prove beyond reasonable doubt its case that these injuries were caused on the morning of 9th January, at Kadiri Police Station by these accused persons?

To establish this the prosecution relies on the direct testimony of Nallasani Appalla, whom we have mentioned above, and the circumstances claimed to be established by the evidence of the Sub-Inspector and three Constables of Kadiri Police Station and the evidence of Bashu, the driver of jatka. Obbayyia, the Sub-Inspector of Kadiri Police Station in January, 1957, has given evidence that when on 9th January, 1957 he returned from his house at about 9 A.M. he saw the Sub-Inspector, Vempalli, one old man and four others in mufti that they were passing towards the wicket gate in the western direction. Two of the men in mufti were supporting the old man and taking him towards west to the wicket gate. (P.W. 14). P.W. 13 Balliah was Station Writer at Kadiri Police Station in January, 1957. His evidence is that early on the morning of 9th January, he came to his room and at that time saw the Sub-Inspector of Vempalli, the Head Constable and some other persons sleeping in it. But later on when after attending the drill he returned to the Police Station and went into his room, after leaving the musket in the guard room he saw something else. What he claims to have seen may best be mentioned in his own words:

"In my room Arige Ramanna was seated leaning to the wall, and stretching his legs. Then Vempalli Head Constable felt the pulse of Arige Ramanna. The Vempalli Sub-Inspector was standing in a depressed mood. Obanna was trying to give coffee to Arige Ramanna but he was not able to take it. That Arige Ramanna appeared to be very weak."

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1. (1955) S.C.J. 283 : (1955) 1 M.L.J. (S.C.) 173 : (1955) 1 S.C.R. 1150.

2. (1964) 2 S.C.J. 307 : (1964) M.L.J. (Cr.) 491.

The witness further says that he asked Vempalli Sub-Inspector to take away the man and the Vempalli Sub-Inspector asked Vempalli Head Constable to get a jatka. The witness says that after this he went to take coffee and when he returned from the coffee house he saw the Sub-Inspector of Vempalli and the Head Constable and the Police Constable—obviously referring to the three respondents,—Obanna and Kamal Sab asking Arige Ramanna to get up. But Arige Ramanna was speaking in a feeble voice and was unable to get up. The witness further says that Obanna and the Head Constable lifted Arige Ramanna supporting the arms and carried him saying that they were taking him to the jatka.

Narasimham, P.W. 15, was a Head Constable at Kadiri Police Station, and he was at the Kadiri Police Station on 9th January, 1957. His evidence is that after attending the drill up to 7-30 A.M. he went to the Police Station to deposit the musket and then went to the Station Writer's room—*i.e.*, Balliah's room. He supports the account given by Balliah that Arige Ramanna was sitting " leaning to the wall with his legs stretched." He says further that after a little while the Vempalli Police Constable got a jatka and informed Sub-Inspector Vempalli and others who were in the Sub-Inspector's room and that then 3 or 4 of those persons carried the man bodily outside to the jatka. The remaining witness from Kadiri Police Station is Nabi Rasool, P.W. 12. As to what he saw on 9th January, 1957 the witness says :—

> " I came back to the Police Station to tell the Writer there that I will go and have some coffee and return. At that time Balayya, Station Writer, was telling Sub-Inspector, and Head Constable of Vempalli to take away Arige Ramanna from there. At that time Ramanna was sitting reclining on wall in Writer's room. The Sub-Inspector Vempalli said that he will take him away and so went into the room. At that time outside Sub-Inspector's room were Head Constable, Police Constable of Vempalli, complainant, P.W. 1 and the prisoner. "

It is clear that by the " complainant " he was meaning the accused Mittalla Kamal Sab and by " P.W. 1 " he was referring to Nallasani Appalla.

These four witnesses, all members of the police force, are wholly disinterested and independent. They have got no enmity against any of the respondents. Indeed, one might think that their sympathies would be with these respondents who are also members of the police force, now in trouble. An attempt was made to discredit them by a suggestion that after Venugopal, Sub-Inspector of Vempalli, had sent Arige Ramanna and Nallasani Appalla away on the morning of 9th January, 1957, the Kadiri Police brought them to the Thana in connection with the investigation for some other crime of Kadiri Police Station and tried to interrogate them. The obvious implication of the suggestion was that Arige Ramanna received his injuries from the hands of the Kadiri Police during such interrogation and so these witnesses of Kadiri Police Station have given false evidence to save themselves. This suggestion was put to the Station Writer, Balliah and denied.

We cannot find the slightest support in evidence for this suggestion. It is not even shown that there was any case of Kadiri Thana in which Arige Ramanna was involved or suspected. The suggestion that Arige Ramanna received his injuries from the Kadiri police is a vain attempt to discredit these witnesses.

The main reason for which the High Court appears to have doubted the veracity of these witnesses is that the occurrence took place at Kadiri Police Station. So the learned Judge observes in his judgment : " It would be advantageous to them if it is shown that, some people other than the police of Kadiri station committed the offence, as alleged by the prosecution." With great respect to the learned Judge, we are of opinion that this is a mere surmise for which there is absolutely no basis. The Kadiri Police could have no reason to be afraid that they would be implicated. For, clearly there was no case of Kadiri Police Station in which Arige Ramanna was involved. Another reason which seems to have appealed to the learned Judge of the High Court is that the evidence of the police witnesses is not supported by any documentary evidence. In our opinion, it would be wholly unreasonable to expect that these officers of Kadiri Police Station would make any note in any of the records about what they saw on the morning of 9th January nor is there anything unusual in the fact pointed out by the learned Judge

that the records of Kadiri Police Station do not contain any mention of the accused having come to the Station or of any Constable of Kadiri Police Station having been deputed to assist Sub-Inspector of Vempalli.

We are bound to hold that there is no reason whatsoever to doubt the testimony of Kadiri Police Station witnesses, *viz.*, P.Ws. 12, 13, 14 and 15 and that the High Court has acted arbitrarily in rejecting their testimony.

Along with the evidence of these witnesses it is necessary to consider the evidence of the Jatkawala, Bashu. It was he who according to the prosecution carried Arige Ramanna from Kadiri Police Station to where his body was ultimately found. His evidence is that two policemen came to him at the bus-stand and took him with the jatka to the wicket gate on the western side of Kadiri Police Station and then those two men came back carrying one man bodily on their hands and laid him in the jatka. These two also sat in the jatka and asked him to drive. He thought that the man who had been laid in the jatka was sick nad drove towards the hospital. But at the direction of the policemen in the jatka he took the road towards Kamatampalli. When they came near a Sugali Tanda he stopped the jatka on their direction and the policemen took down that man carried and placed him by the side of the wall of a hut in that Tanda and left him there. Bashu says that he then took the two policemen in the jatka to Kadiri Police Station and was paid Rs. 3.

Though Bashu does not claim to know the man who was thus carried and left near the Tanda, there can be no doubt however when we read his evidence with the evidence of Kadiri police witnesses and the fact later discovered that Arige Ramanna's dead body was found near the Tanda, that it was Arige Ramanna who was carried in Bashu's jatka on that date. Much has been sought to be made by the defence of the fact that Bashu's statement as recorded in the Sessions Court is that it was " afternoon time " when the policemen came and took his jatka to Kadiri Police Station. This is clearly contrary to the account given by the police witnesses that it was about 9 A.M. in the morning that Arige Ramanna was taken away in the jatka from Kadiri Police Station. We have no doubt that this statement of afternoon time was a mistake due to the fact that Bashu, a young man of 23 years, was giving evidence more than 21 months after the incident. It is also to be noticed that later on in his examination-in-chief itself he said " that when he was paid Rs. 3 at the Police Station on return from the Tanda it was little afternoon time." This itself indicates that his earlier statement of afternoon time was not correct. Notice may also be taken of the question that was put to the witness in examination-in-chief, *viz.*, " Did not you see Razack when your jatka was taken by these people that morning?" The witness's answer was " No." Nothing was asked about the time, in cross-examination. It is not unreasonable to think that the Counsel of both parties had understood Bashu's evidence to mean that it was morning when the policemen came and called him to go with his jatka. That gives some support for Mr. Chari's submission on behalf of the State that " afternoon time " was recorded by the Judge in error. But assuming the witness did say " afternoon time," it must have been, in our opinion, due to lapse of memory on his part due to the fact that he was giving evidence on 11th September, 1958 about something which happened on 9th January, 1957. In our opinion therefore, far from contradicting the evidence of the Kadiri police witnesses, Bashu's evidence supports and corroborates what they said about Arige Ramanna being taken away in a jatka from Kadiri Police Station on the morning of 9th January, 1957.

Another witness who deserves mention is the goldsmith, Gorantla Fakruddin examined as the 11th witness for the prosecution. He has identified the respondent Venugopal as the person who took him to the Police Station where in the presence of P.W. 1 Nallasani Appalla and Arige Ramanna he stated on oath in reply to Sub-Inspector's questions whether it was true that Arige Ramanna got gold gajjalu melted and gave the same to Nallasani Appalla, that he knew nothing about it; and that then he was sent back home. This he said had happened at Madanapalli. Fakruddin mentioned January, 1956 as the time when this happened.

Obviously this is a mistake for January, 1957. His evidence thus proves the circumstance—which really does not appear to have been ever disputed and was not disputed before us—that on 9th January, 1957, Venugopal was trying to verify Arige Ramanna's statement about a gold gajjalu and found that the information he had given was not true.

The circumstances that are established by the evidence of the witnesses already discussed may now be enumerated thus :—

On 6th January, 1957 Venugopal arrested Patra Obanna, the absconding accused in the theft case instituted in 1962 on the complaint of Kamal Sab ;

Later the same date, the three respondents took Arige Ramanna into custody in connection with the same case ;

On the following, *i.e.*, 7th January, a gold gajjalu was seized in the same connection by Venugopal from the house of Nallasani Appalla ;

On the evening of 8th January, Venugopal examined Fakruddin to verify Arige Ramanna's statement as regards the gajjalu and found that the information he had given was not true ;

Early in the morning of 9th January, Venugopal, Rangaswamy and Subbaiah and some other men were seen in the Sub-Inspector's room at Kadiri Police Station;

At about 9 A.M. Arige Ramanna was seen in the Station Writer's room in the Police Station leaning against the wall with his legs outstretched ; Rangaswamy was feeling his pulse, Venugopal standing by him in a depressed mood, Obanna trying to induce Arige Ramanna to take some coffee ;

Just after this when the Station Writer, Kadiri Police Station asked Venugopal to take away the man, that is, Arige Ramanna, Venugopal asked Rangaswamy to fetch a jatka, a jatka was brought by Bashu and the three respondents asked Arige Ramanna to get up ; Arige Ramanna was not able to get up. Then, Obanna and Rangaswamy lifted Arige Ramanna into the jatka. Jatka was then driven to Sugali Tanda and two men who carried Arige Ramanna into the jatka, carried him out of the jatka and left him lying by the side of the wall of a hut in that Tanda ;

Later the same day Arige Ramanna was discovered on that place dead and with a number of injuries which the medical evidence shows were ante-mortem.

When all these circumstances are considered together they show one clear connected picture that intent upon getting some clue about a gold gajjalu which had been stolen from Kamal Sab's house in 1952 and exasperated by what he thought to be Arige Ramanna's deliberate attempt to conceal the truth, Venugopal brought Arige Ramanna back to Kadiri Police Station on the morning of 9th January, 1957 and there under his instruction, his subordinate the two Police Constables, Rangaswamy and Subbaiah, beat up Arige Ramanna and between them inflicted the injuries which were ultimately discovered by the doctor.

It is not possible to accept Venugopal's suggestion that after he returned from Madanapalli to Kadiri early in the morning of 9th January, he asked Arige Ramanna and Nallasani Appalla to go away. It would not be normal human conduct for him to acknowledge defeat at that stage and the probabilities of the case strongly support what is proved by the direct evidence of the witnesses that Arige Ramanna was taken by him to Kadiri Police Station on the morning of 9th January, and not allowed to go away.

We are unable to find a single circumstance inconsistent with the prosecution case that these three respondents beat up Arige Ramanna at Kadiri Police Station for the purpose of extorting from him information as regards the disposal of a gold gajjalu that might lead to further detection in connection with the case of house-breaking and theft committed at the house of Kamal Sab in 1952.

The circumstances that have been established are in our opinion incapable of explanation on any other reasonable hypothesis than the truth of the prosecution

case that these respondents voluntarily caused hurt to Arige Ramanna for the purpose of extorting from him information regarding the disposal of the gold gajjalu which might lead to fuller detection of the crime. The circumstances speak so clearly that any other view would, we think, be unreasonable, arbitrary and indeed perverse.

On a consideration of the injuries that were caused, we do not find it possible to be certain that the respondents had the intention of causing grievous hurt to Arige Ramanna. What is proved beyond doubt however is that they voluntarily caused hurt to Arige Ramanna for the purpose mentioned above. Thereby, they committed an offence under section 330 of the Indian Penal Code, though not under section 331 of that Code.

In view of this conclusion from the circumstantial evidence adduced in the case it is hardly necessary to discuss the direct testimony given by Nallasani Appalla, the prosecution witness No. 1. As however the Trial Court on a consideration of the evidence believed it to be substantially true except as regards the fourth accused Kamal Sab, who is no longer before us, and the High Court has expressed a contrary opinion, we shall briefly refer to his evidence.

We think it proper to point out that the judgment of the High Court does not contain any discussion worth the name of what this witness has said or of the reasons which induced the High Court to characterize it as "unreliable."

It has already been stated above that the three respondents came to the house of this witness on 7th January, 1957 and a gold gajjalu was seized from his house and that on the following day this witness and Arige Ramanna were with Venugopal when he interrogated the goldsmith Gorantla Fakruddin as regards Arige Ramanna's story that he had given the gajjalu to this witness in Fakruddin's presence. After Fakruddin denied on oath the truth of this story, Arige Ramanna was brought back from Madanapalli, where Fakruddin was found and interrogated to Kadiri, Nallasani Appalla has given evidence that Venugopal then took both of them into his room. As to what happened next he said :—

"A-2 asked A-1 what Fakru Sab had said. A-1 replied that Fakru Sab had denied. Then A-2 began to abuse Arige Ramanna that he is a thief and is giving false information. A-3 also abused and A-2 began to beat him. A-3 also began to beat Ramanna. A-4 also began to beat him. They beat him with hands, fists and elbows. A-1 said that it is not the proper way and said that the hands should be tied. A-3 pushed me out and the door was closed. I stood at the window, opening into the verandah. The window was not closed. A-3 said to Ramanna "hold out your hands", as he had folded his hands and requested that his hands be not tied. A-3 took hold of the tuft of Arige Ramanna and pulled him up and down. A-4 pulled out the hands of Arige Ramanna and A-3 tied patties used by police on their legs to the hands. The hands of Arige Ramanna were put back on his back by A-3 and A-4 put a stick between the hands and neck of Ramanna. A-3 and A-4 pressed the stick and Ramanna fell down on his face. A-2 abused Ramanna and hit him with a stick on his head, at back of the head. The stick was that used by the police. On being hit Ramanna cried out "I am killed" and he admitted that he gave the property to Tai people at Kadiri. On this A-1 told them to take out the stick and release the hands. It was done."

This is the account of the beating given by this witness. The Trial Court has not believed what he said as regards the fourth accused, Kamal Sab and to this extent we must hold that the witness has not told the truth. That by itself is however not sufficient reason to disbelieve what he has said about the other accused persons. It seems to us very probable that Nallasani Appalla also would be taken by Venugopal to the Thana on return from Madanapalli. It seems also more than likely that he would be interested to know how the police proceeded to tackle Arige Ramanna whose false word had brought him (the witness) to trouble. We find nothing improbable in the story given by him that from where he stood at the window he could see what was happening inside the room.

Mr. Keswani drew our attention to the doctor's evidence that five of the nine injuries could be caused only by a stick with thorny surface or surface with thin points and commented that this showed that Nallasani Appalla who has not mentioned any such weapon, did not see the occurrence. We are not impressed by this argument. It has to be remembered that Nallasani Appalla himself must have been in great terror when he saw the way in which Ramanna was being

treated. It is also necessary to remember that he was giving evidence on 1st September, 1958, of an occurrence which took place on 9th January, 1957. It is also not unlikely that though he could see from outside the room the beating that was being given, he could not clearly distinguish the details of the weapons that were being used.

We also do not find any substance in Mr. Keswani's argument that the Doctor's evidence that on post-mortem examination the stomach contents were found to contain about 15 ozs. of semi-digested liquid food and water, is inconsistent with Nallasani's story that after the beating some coffee and idli were brought but Ramanna sipped some coffee and said that he could not take any more. It is not improbable that though Arige Ramanna managed to take some idli also in addition to coffee, this was not noticed by Nallasani Appalla ; or it may be that though he did notice it he did not remember this at the time he was giving evidence about 21 months after the occurrence. Even if it be believed that Arige Ramanna did not take idli that morning the presence of semi-digested liquid food might well be due to something which had been taken by Arige Ramanna before he reached the Police Station. The argument sought to be built by the learned Counsel on the Doctor's evidence as regards the stomach contents must therefore be rejected.

There can be no doubt that Nallasani Appalla must have been very angry with these respondents for the unjust search of his house and for the indignity to which he had been put. We do not think however that could make him so bold as to give false testimony against persons in the position of these respondents.

On a consideration of all the circumstances of the case, we are of opinion that the Sessions Judge was right in his assessment of this witness' testimony against these three respondents and the High Court was wrong in considering his evidence as wholly unreliable.

Nallasani's evidence by itself would be sufficient to prove that the accused had committed an offence under section 330 of the Indian Penal Code. But the circumstantial evidence we have discussed above so clearly establishes their guilt for this offence that it is unnecessary to seek any further support for it.

For the reasons mentioned above, we have come to the conclusion that the decision of the High Court that there was any doubt about the truth of the prosecution case that these respondents beat up Arige Ramanna does not bear scrutiny and it is wholly unjustified. The interests of justice demand that the High Court's decision on this question should not be allowed to stand.

Accordingly, we set aside the order of High Court acquitting the respondents altogether in respect of injuries caused to Arige Ramanna, and convict them all of an offence under section 330 of the Indian Penal Code.

On behalf of the State Mr. Chari does not press the appeal against the acquittal of the respondents on the other charges, *viz.*, sections 343, 348 and 201 read with section 109 of the Indian Penal Code.

The learned Sessions Judge awarded a sentence of five years' rigorous imprisonment for the offence under section 331 of the Indian Penal Code. Though we have altered the conviction to one under section 330 of the Indian Penal Code, we do not think we shall be justified in reducing the sentence. A serious view cannot but be taken of such a barbarous method of dealing with persons suspected of a crime as was committed by these respondents in this case. It is necessary that deterrent sentences should be inflicted for such an offence when established.

Accordingly, we convict the respondents under section 330 of the Indian Penal Code and we sentence each of them to five years' rigorous imprisonment.

The appeal is thus allowed in part and is dismissed as regards the acquittal of the respondents on other charges. The accused to surrender to their bail.

K.S. ——— *Appeal allowed in part.*

THE SUPREME COURT OF INDIA.

PRESENT :—K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.

Parimisetti Seetharamamma .. *Appellant**

v.

Commissioner of Income-tax, Andhra Pradesh, Hyderabad .. *Respondent.*

Income-tax Act (XI of 1922), sections 3, 4, and 66—Receipt sought to be taxed as income—Burden on the Department to prove that the receipt is within the taxing provision—Source and nature of receipt—Failure to disclose on the part of assessee—Open to inference by Department that receipt is assessable income—Disclosure of source and nature of receipt by assessee—Claim that income is not taxable income—No inference of taxability on the failure of the assessee to prove claim—Tribunal wrongly throwing onus of proof on assessee—Conclusion not binding upon the Court.

The assessee, carrying on business in money-lending and conducting cinematograph theatre submitted a return of her income for the assessment year 1947-48, disclosing in a statement that the assessee was in receipt of some jewels and money aggregating to about five lakhs of rupees given to her by a Princess out of natural love and affection. This amount was not taxed as income for that year. In the course of assessment proceedings for the year 1951-52 the Income-tax Officer was inclined to treat the sum as remuneration for services rendered to the Princess and notice under section 34 was issued. A detailed explanation as to the source of the money was given by the assessee for her claim that it was not taxable income. The assessee was also examined before the Officer. The Department and the Tribunal and the High Court in Reference held that the receipt was taxable income by throwing the burden of proof on the assessee. The assessee appealed,

Held, the receipt by the assessee is not assessable to tax.

By sections 3 and 4 the Income-tax Act imposes a general liability to tax upon all income. But the Act does not provide that whatever is received by a person must be regarded as income liable to tax. In all cases in which a receipt is sought to be taxed as income, the burden lies upon the Department to prove that it is within the taxing provision. Where however a receipt is of the nature of income, the burden of proving that it is not taxable because it falls within an exemption provided by the Act lies upon the assessee.

Whether a receipt is liable to be treated as income depends very largely upon the facts and circumstances of each case; it is open to the Income-tax Authorities to raise an inference that a receipt by an assessee is assessable income where he fails to disclose satisfactorily the source and nature of the receipt. No inference can be drawn that a receipt is taxable as income because the assessee fails to lead all evidence in support of the case pleaded by him that the receipt is not within the taxing provision.

The conclusion of the Tribunal is based on matters which may at the largest create some suspicion, and upon its view that the burden of proving that the receipts were not taxable lay upon the assessee. But a conclusion recorded by the Tribunal by wrongly throwing the burden of proof upon the assessee cannot be regarded as binding upon the High Court in a Reference under section 66 of the Act. There are no materials to conclude what the assessee had received was remuneration for performance of services and not as gifts.

Appeals by Special Leave from the Judgment and Order, dated 13th April, 1960, of the Andhra Pradesh High Court in Case Referred No. 11 of 1960; and

Appeals from the Judgment and Order dated 13th April, 1960, of the Andhra Pradesh High Court in Case Referred No. 12 of 1960.

N. A. Palkhiwala, Senior Advocate (*R. Ganapathy Iyer*, Advocate, with him), for Appellant (In all the Appeals).

N.D. Karkhanis and *R.N. Sachthey*, Advocates, for Respondent (In all the Appeals).

The Judgment of the Court was delivered by

Shah, J.—The appellant carried on business at Nuzvid as a money-lender and conducted a cinematograph theatre. In respect of income from property and business she submitted a return of her income for the assessment year 1947-48 and disclosed in a statement dated 26th August, 1949 that Sita Devi—Maharani of Baroda—had between 10th November, 1945, and 11th February, 1948 " out of natural love and affection " given to her some jewellery and four amounts of money which aggregated to Rs. 5,20,000. The Income-tax Officer, Special Circle, Vijayawada, accepted the appellant's statement and did not treat the money and jewellery received by her as taxable income. In the course of assessment proceed-

* C.As. Nos. 199, 200, 201 and 202 of 1964. 21st April, 1965.

ings for the year 1951-52 the Income-tax Officer was inclined to treat the money and jewellery given to the appellant as remuneration for services rendered to Sita Devi as a maid-servant. He accordingly issued a notice under section 34 of the Income-tax Act and called upon the appellant to "submit an explanation adducing all documentary and other evidence in her possession relating to the receipt of assets admitted by her in her statement" dated 26th August, 1949, and relating to other cash amounts and cheques received by her between 25th August, 1948, and 23rd October, 1952, and to other assets possessed by the appellant and disclosed by her in her "wealth statement". By her statement, dated 27th November, 1953, the appellant submitted a detailed explanation about the items referred to in the letter of the Income-tax Officer and claimed that income received by her was earned with the aid of property which Sita Devi and the Yuvarani of Pithapuram had given to her out of love and affection from time to time. On 26th December, 1954, the appellant was examined on oath before the Income-tax Officer. She stated that :

> "The credits in my accounts are all out of gifts..............As to correspondence I have very few letters but such of them as I have contain 'matters relating to others'. I shall produce them if you are prepared to exclude those portions. What other record I have I gave to my Auditors. I have no objection to their producing all those records before you. In fact I desire that they should do so..............A complete inventory of records with my Auditor will be given to you on Monday and you may look into them..............I can give full particulars for all deposits in my accounts. I have not purchased any jewellery worth mentioning. I have filed a statement for that. All my jewels are gifted by Shrimati Seetha Devi."

The Income-tax Officer by his order dated 31st March, 1956 held that the

> "gifts made by Sita Devi were remuneration for services rendered by the appellant as a maid-servant or Secretary to the Princess and were accordingly taxable as income in her hands".

For the year 1946-47 he determined the escaped income of the appellant at Rs. 4,70,000 (Rs. 4,00,000 being the value of jewellery and Rs. 70,000 cash). He determined the escaped income for the year 1947-48 at Rs. 2,50,000, for the year 1950-51 at Rs. 96,600 and for the year 1951-52 at Rs. 30,000.

In appeal the Appellate Assistant Commissioner agreed with the Income-tax Officer that the receipts were income taxable under the Income-tax Act, but he valued the jewellery received by the appellant in the account year corresponding to the assessment year 1946-47 at Rs. 20,000 and directed consequential modifications in that order. The Income-tax Appellate Tribunal held that the Income-tax Officer was justified in reopening the assessment under section 34, and that cash, cheques and jewellery received by the appellant from Sita Devi in the previous year corresponding to the assessment years 1946-47, 1947-48, 1950-51 and 1951-52 being remuneration for services rendered, were taxable.

The Tribunal submitted two consolidated Statements of Case—one in respect of the assessment years 1946-47 and 1951-52 and the other in respect of the years 1947-48 and 1950-51 and submitted in each of the Statements the following question:

> "Whether on the facts and in the circumstances of the case what the assessee received in the relevant years is assessable to tax and whether section 34 of the Income-tax Act could be invoked in regard to the years 1947-48, 1948-49 and 1950-51 ?"

(Reference to the year 1948-49 in the question is due to oversight as no reference was asked for and none was made in respect of that year.) The High Court held that there was evidence before the Tribunal to support of the finding that the appellant was an employee of Sita Devi and that the cash, cheques and jewellery admitted as received by the appellant were not given to her as gifts made out of love and affection, but as remuneration for services rendered. In the Reference relating to the years 1947-48 and 1950-51 the High Court called for a Supplementary Statement, for determination of the question whether action under section 34 was justifiable. The Tribunal submitted a Supplementary Statement and thereafter the High Court answered the second branch of the question holding that the action of the Income-tax Officer under section 34 was justified. The appellant has appealed to this Court against the order of the High Court recording answers in the two References.

It is not necessary to consider whether the Income-tax Officer was competent to issue a notice under section 34 of the Income-tax Act for the years 1947-48 and

1950-51, for in our view the property received by the appellant was not remuneration given to her by Sita Devi for services rendered or to be rendered by her.

The High Court in dealing with the question about the liability of the receipts to tax observed :

"The Supreme Court in the case of *Commissioner of Income-tax* v. *Calcutta Agency, Ltd.*[1] observed that the burden of proving the necessary facts in order to entitle the assessee to claim exemption was upon the assessee. It would therefore appear that where admittedly the assessee was in receipt of large sums of money as shown in the accounts submitted by her, that they were outside the pale of taxable income was a matter which had to be established by the assessee herself. The question is as to whether the assessee has discharged the burden that lay upon her. She did not produce any evidence in support of her case that these amounts were gifts made by Sita Devi out of love and affection. When she was asked to lead evidence to substantiate her contention she pleaded utter inability to do anything of the kind and denied the existence of any correspondence which would throw any light upon the question and simply contented herself by making *bland* statements like 'Her Highness Sita Devi Gaekwad of Baroda used to give me these gifts according to the will and pleasure of Her Highness'. With regard to the jewellery that she received from Princess Sita Devi she makes the same statement to say that these were received as gifts on various occasions in India and she says 'I do not have any correspondence regarding these gifts.' ...... The bare allegation unsupported by any evidence, in our opinion, was not sufficient to discharge the burden which lay upon the assessee..........the burden lay upon the assessee in this case to establish that the amounts received were voluntary payments made by the Princess out of love and affection."

In so observing, the High Court, in our judgment has committed an error of law. By sections 3 and 4 the Act imposes a general liability to tax upon all income. But the Act does not provide that whatever is received by a person must be regarded as income liable to tax. In all cases in which a receipt is sought to be taxed as income, the burden lies upon the Department to prove that it is within the taxing provision. Where however a receipt is of the nature of income, the burden of proving that it is not taxable because it falls within an exemption provided by the Act lies upon the assessee. The appellant admitted that she had received jewellery and diverse sums of money from Sita Devi and she claimed that these were gifts made out of love and affection. The case of the appellant was that the receipts did not fall within the taxing provision : it was not her case that being income the receipts were exempt from taxation because of a statutory provision. It was therefore for the Department to establish that these receipts were chargeable to tax. The decision of this Court in *Commissioner of Income-tax, West Bengal* v. *Calcutta Agency, Ltd.*[1] lends no support to the proposition which the High Court has enunciated. That was a case in which the taxpayer was claiming under section 10 (2) (xv) allowance for an expenditure out of the income of the business and to establish such a claim indisputably the burden lay upon the taxpayer. The following observations made by Kania, C.J., in delivering the judgment of the Court make the ratio of the judgment clear :

"Now it is clear that this being a claim for exemption of an amount, contended to be an expenditure falling under section 10 (2) (xv), the burden of proving the necessary facts in that connection was on the assessee, it being common ground that the commission was due and had become payable and was therefore the business income of the assessee company liable to be taxed in the assessment year."

Counsel for the Commissioner submitted that where an assessee fails to prove satisfactorily the nature of the receipt, it is open to the Income-tax Officer to infer that the receipt is taxable, and relied upon the observations made in *A. Govindarajulu Mudaliar* v. *Commissioner of Income-tax, Hyderabad*[2] by Venkatarama Aiyar. J., who speaking for the Court observed :

"There is ample authority for the position that where an assessee fails to prove satisfactorily the source and nature of certain amount of cash received during the accounting year, the Income-tax Officer is entitled to draw the inference that the receipts are of an assessable nature."

But these observations cannot be read divorced from their context. In the books of the firm in which the assessee was a partner certain amounts were found credited to the assessee, and when called upon to explain how he came to possess those amounts, he rendered an explanation which was not accepted by the Tribunal,

1. (1951) S.C.J. 177 : (1951) 1 M.L.J. 366 : (1950) S.C.R. 1008.

2. (1958) 34 I.T.R. 807 ; A.I.R. 1959 S.C. 248.

and the amounts were treated as income liable to tax. It was argued on behalf of the assessee in *Govindarajulu Mudaliar's case*[1], that even if the case set up by him was not accepted by the Tribunal, it did not follow as a matter of law that the amounts in question were income received during the previous year, and it was for the Department to adduce evidence to show from what source the income was derived and why it should be treated as concealed income, and in the absence of such evidence the finding of the Tribunal was erroneous. This Court held that it was open to the Income-tax Officer when the assessee failed satisfactorily to disclose the source and nature of the receipt to treat that as concealed income of the previous year in which the assessee was being taxed. The observation relied upon does not lay down a proposition that it may be inferred that a receipt is taxable as income because the assessee fails to lead all evidence in support of the case pleaded by him that the receipt is not within the taxing provision. Whether a receipt is liable to be treated as income depends very largely upon the facts and circumstances of each case: it is open to the Income-tax Authorities to raise an inference that a receipt by an assessee is assessable income where he fails to disclose satisfactorily the source and the nature of the receipt. But in this case the source of the income was disclosed by the appellant, and there was no dispute about the truth of that disclosure.

The High Court disposed of the Reference holding that the onus of proving that the receipts were not taxable lay upon the appellant, and that he did not discharge that burden. On the view expressed by us the answer recorded by the High Court on the taxability of the receipts must be discharged. Since the High Court has not considered the evidence, we would normally have remanded the case for disposal of the Reference according to law. But this proceeding has been pending for a very long time, and that in enforcement of the orders of assessment the entire property of the appellant has been attached. We have therefore thought it fit to hear and decide the Reference on the merits.

In the view of the Income-tax Appellate Tribunal, in determining the question whether receipts by the appellant represented income liable to be brought to tax under the Income-tax Act, it could not be said that there were no materials justifying the Department in treating the assessee as being an employee of Sita Devi, for apart from the information the Department had collected from various sources, there were clear indications that the assessee was acting as the local agent of Sita Devi in Pitta-puram for disbursing salary to various servants of Sita Devi, and that she was described as the Private Secretary to Sita Devi in a " bill " issued by the Bombay Garage, Ltd., and that in any event it was for the appellant to prove her case of gift. The Tribunal then observed that the word " income " is not precisely defined in the Act and the Act seeks to bring to tax all income, profits and gains from whatever source derived and inasmuch as receipt of the amounts and jewellery in question had been admitted it was for the appellant to establish that it was not liable to be taxed under the Act. Observing then that the appellant had not placed " all the cards on the table which will go to show the real nature of the receipt of the amounts and the jewellery " and had declined to produce the correspondence which passed between her and Sita Devi, but merely offered to produce certain extracts from the letters which the Income-tax Officer refused to admit, it was open to the Income-tax Authorities to raise an inference that the receipts were income. When ample opportunity was given to the assessee to explain the nature of the receipts and since the appellant had not chosen to do so, she was not entitled to the exemption under section 4 (3) (vii).

The conclusion of the Tribunal recorded on this process of reasoning was open to grave challenge in point of law. It does not appear that any serious attempt was made by the appellant to prove that the receipts under discussion were exempt from tax, because they were casual and of a non-recurring nature. The appellant's case primarily was that the receipts were not taxable because they were not income chargeable to tax. The Tribunal rightly observed that the information collected by the Department from different sources which consisted of record of *ex parte*

1. (1958) 34 I.T.R. 807: A.I.R. 1959 S.C. 248.

statements of certain persons about the relation between Sita Devi and the appellant, which they even declined to give in writing, could have no value in establishing the case of the Department. There remained two pieces of evidence on which the Tribunal relied—(i) admission made by the appellant that she acted as the local agent in Nuzvid for disbursing salary to servants of Sita Devi and (ii) in a "bill" issued by the Bombay Garage, Ltd. the appellant was described as "Private Secretary to Princess Sita Devi". But these circumstances could not establish that what was given to her by Sita Devi was remuneration for services rendered or to be rendered. Realizing this infirmity, the Tribunal observed that the burden of proving that the receipts were not income lay upon the appellant. The Tribunal did not infer that as remuneration for disbursing salary to Sita Devi's servants she was given large amounts of money and jewellery. Description of the appellant in the cash memo. issued by the Bombay Garage, Ltd. as "Private Secretary to Princess Sita Devi" could have no evidentiary value. It is not claimed that there was evidence on the record that this was the general repute of the appellant. Description of the appellant as Private Secretary of Sita Devi in a stray cash memo issued by a third party about the source of whose knowledge there is not an iota of evidence, could not evidence a relationship of master and servant: much less could it prove that what was given by Sita Devi to the appellant was remuneration for service rendered. The conclusion of the Tribunal is therefore based on matters which may at the highest create some suspicion, and upon its view that the burden of proving that the receipts were not taxable lay upon the appellant. But a conclusion recorded by the Tribunal by wrongly throwing the burden of proof upon the assessee cannot be regarded as binding upon the High Court in a Reference under section 66 of the Income-tax Act.

Counsel for the Commissioner contended that beside the two circumstances relied upon by the Tribunal, there were other circumstances on which the conclusion of the Tribunal could be sustained. These circumstances, Counsel submitted, are on the record and must have weighed with the Tribunal in arriving at its finding that the receipts by the appellant were of the nature of income. These were (*a*) that the appellant belonged to a family of *Dasis* who are generally employed in the ruling family of Pittapuram in a menial capacity; (*b*) that the appellant was receiving a salary of Rs. 8 per month from the Maharaja of Pittapuram; (*c*) that the appellant was associated with Sita Devi for at least 8 years before the earliest year of account relevant in these appeals; (*d*) that large amounts in cash and also jewellery were given to the appellant from time to time after Sita Devi married the Gaekwad of Baroda; (*e*) that the gifts commenced immediately after Sita Devi married the Gaekwad of Baroda; (*f*) that the appellant assisted Sita Devi in securing divorce from the Yuvaraja of Vuyyur and in to getting married the Gaekwad of Baroda; (*g*) that the appellant lived with Sita Devi in London in the year 1949-50 and also at Baroda; and (*h*) that similar gifts were given to one Narsinghrao "associate of the appellant" and to the daughters of the appellant's sisters. There is no evidence in support of (*f*), and the circumstances (*a*) to (*c*) and (*g*) cannot possibly lead to the conclusion that property of large value was given to the appellant by Sita Devi as remuneration for performance of service. Circumstance (*h*) is irrelevant.

On the first part of the two questions it must be recorded that what the assessee received in the relevant years of account was not assessable to tax. It is unnecessary to record, as already observed, a finding on the second branch of the question, *viz.*, whether section 34 of the Income-tax Act could properly be invoked in regard to those receipts.

The appeals will be allowed. The Commissioner will pay the costs of the appellant in this Court and in the High Court. One hearing fee.

V.S. *Appeals allowed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—K. SUBBA RAO, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.

Potti Lakshmi Perumallu .. *Appellant* *

v.

Potti Krishnavenamma .. *Respondent.*

Hindu Women's Rights to Property Act (*XVIII of* 1937), *section* 3 (2) *and* (3)—*Hindu widow's interest in the joint family property of her deceased husband—Determination of quantum of—Material date.*

Hindu Law—Joint family—Disruption in status by means of will—Feasibility.

Hindu Law—Family arrangement—When enforceable.

The quantum of interest to which a Hindu widow is entitled under section 3 (2) of the Hindu Women's Rights to Property Act (XVIII of 1937) is to be determined as on the date on which she seeks to enforce partition under section 3 (3) and not as on the date on which her husband died. Thus her interest under section 3 (2) is a fluctuating one liable to increase or decrease according as there are deaths in or additions to the members of the family or according as there are accretions to or diminutions of the property.

A Hindu widow does not by virtue of the interest given to her under section 3 (2) become a coparcener, though her interest in the family property is to be the same as that of her deceased husband except that in extent it is to be that of a Hindu widow. (Now, of course, it has been enlarged by section 14 of the Hindu Succession Act, 1956). But a coparcener has no defined interest in the joint family property and the right which he has is to claim for partition. The quantum of his interest would be determinable with reference to the date on which such member unequivocally declares his intention to separate and thus puts an end to the coparcenery. It cannot even be suggested that the event of the death of a coparcener is tantamount to an unequivocal declaration by him to separate from the family. According to the theory underlying the Hindu law the widow of a deceased Hindu is his surviving half and therefore as long as she is alive he must be deemed to continue to exist in her person. This surviving half had under the Hindu Law texts no right to claim a partition of the property of the family to which her husband belonged. But the Act of 1937 has conferred that right upon her. When the Act says that she will have the same right as her husband had it clearly means that she would be entitled to be allotted the same share as her husband would have been entitled to had he lived on the date on which she claimed partition.

It cannot be said that property of one person can on his death devolve on another only by survivorship or by inheritance and in no other way. For, it is competent for the Legislature to confer a right on a person to get the property of another on the latter's death in certain circumstances. This is precisely what has been done by the Legislature in enacting section 3 (2) of the Hindu Women's Rights to Property Act, 1937.

What was held in *A. Raghavamma and another* v. *A. Chenchamma and another*, (1964) 2 S.C.R. 933, was that a member of a joint family can bring about a separation in status by a definite and unequivocal declaration of his intention to separate from the family and enjoy his share in severalty by expressing such an intention even in a will. No such separation can be said to have taken place by the deceased executing a will in the instant case, as the will does not show an unequivocal intention on the part of the testator to separate himself from the family.

No doubt a family arrangement which is for the benefit of the family generally can be enforced in a Court of law. But before the Court would do so, it must be shown that there was an occasion for effecting a family arrangement and that it was acted upon.

Appeal by Special Leave from the Judgment and Decree, dated 11th December, 1958 of the Andhra Pradesh High Court in Appeal Suit No. 1142 of 1953.

S. T. Desai, Senior Advocate (*T. V. R. Tatachari*, Advocate, with him), for Appellant.

G. Venkatarama Sastri and *R. Gopalakrishnan*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Mudholkar, J.—This is an appeal by Special Leave from the judgment of the High Court of Andhra Pradesh affirming the decrees for partition and separate possession of certain movable and immovable properties, passed by the Second Additional Subordinate Judge, Vijayawada.

The genealogical table showing the relationship between the parties set out below will be of assistance in appreciating the facts of the case :

* C.A. No. 519 of 1961. 13th August, 1964.

Potti Subba Rao (died in 1919)

m-First wife-Sitaramiah (died on 10-8-1938) m-Second wife Krishnavenamma (Plaintiff)		Lakshmi Perumallu (defendant)	Krishnamurti (died in 1930)
Pulla Rao (died in 1939)			

Potti Subba Rao who died in the year 1919 was survived by three sons Sitaramaiah, Lakshmi Perumallu and Krishnamurti. Sitaramaiah was married twice. From the first wife he had a son named Pulla Rao. After the death of the first wife he married Krishnavenamma, the plaintiff in the suit. Sitaramaiah died on 10th August, 1938. No issue was born to Krishnavenamma who was only 14 years of age at the time of Sitaramaiah's death. Pulla Rao died in the year 1939 at the age of 11 years. Krishnamurti died in the year 1930, *i.e.*, before Sitaramaiah, without leaving any issue or a widow. The plaintiff continued to stay in the same house as the defendant till the beginning of July, 1950. Then she suddenly left the house and instituted the suit in question on the 6th of that month. According to her Sitaramaiah and his two brothers, the defendant and Krishnamurti, acquired large movable and immovable property at Vijayawada, described in the schedule to the plaint, with the aid of their ancestral business. She claimed half share in the entire property set out in the schedules, by virtue of the provisions of the Hindu Women's Rights to Property Act, 1937. She admitted that her husband had purported to execute a will before his death but contended that it was inoperative because he was a member of a Hindu joint family at the time of his death.

The defendant contested the claim on various grounds. According to him there was no ancestral property and the suit properties were acquired by the brothers by their individual efforts and treated as self-acquisition. Further according to him the will executed by Sitaramaiah is valid and binding on the plaintiff and that the property allotted to the plaintiff under the will was being enjoyed by the plaintiff and further the properties allotted to Pulla Rao devolved upon him after Pulla Rao's death. Lastly, according to him even if the property were held to be joint family property of Sitaramaiah and the defendant the plaintiff would be entitled only to ¼th share in them and not half share.

The Courts below have found that the suit properties were the joint family properties of Sitaramaiah and the defendant, that the will executed by Sitaramaiah was inoperative and not binding on the plaintiff and that the plaintiff is entitled to half share in the suit properties. The trial Court gave direction to the effect that a Commissioner be appointed for ascertaining the property liable to be partitioned and for dividing them into two equal shares by metes and bounds for the purpose of awarding to the plaintiff the separate possession of her half share in the properties.

Mr. S. T. Desai who appears for the defendant-appellant has not challenged the concurrent findings of the Courts below to the effect that the properties acquired by the family were joint family properties. He, however, urged the following three contentions before us :

"(1) The will executed by Sitaramaiah on August 3, 1938 itself resulted in severance in the status of the two brothers constituting the joint family and that in any event separation ensued between them at the death of Sitaramaiah ;

(2) that at any rate the will should be construed to be a family arrangement made by the karta of the family and assented to by the defendant and by the father and the foster-father of the plaintiff on her behalf ;

(3) assuming that neither of the two contentions is correct, the interest to which the plaintiff would be entitled would be ¼th share in the property and not half share therein. This interest has to be ascertained as on the date of the death of Sitaramaiah.

All these contentions were also urged before the High Court but were negatived by it and in our opinion, rightly. Mr. Desai has, however, placed reliance upon a recent decision of this Court in *A. Raghavamma and another* v. *A. Chenchamma and*

another[1], in support of the contention that the will itself effected a severance in status. What was held in that case was that a member of a joint Hindu family can bring about a separation in status by a definite and unequivocal declaration of his intention to separate himself from the family and enjoy his share in severalty by expressing such an intention even in a will. It was further held that the knowledge of the expression of intention to separate has to be brought home to the persons affected by it and if that is done it relates back to the date when the intention was formed and expressed. A perusal of the will, Exhibit B-1, does not however unmistakably show that the intention of Sitaramaiah was to separate himself from the joint family. At the outset he has stated :

> " I have executed this will regarding the arrangements to take effect after my life-time with regard to the enjoyment of joint immovable and movable properties which are possessed by me and under my management by my brother and others."

In the second paragraph he has stated that he had no ancestral property at all and that the business carried on by himself and his brother was established by them. In the third paragraph he directed that the plaintiff shall maintain his son Pulla Rao and that his brother would look after the interests of Pulla Rao. The 4th, 5th and the 8th paragraphs on which reliance is placed by Mr. Desai run thus :

> "4. If for any reason the said Krishnaveni does not agree to be like that my younger brother Lakshmi Perumallu shall deliver possession of the upstair house constructed newly on the house site purchased from Nadakurthi Kristamma and others and the tiled room situate in the big street and purchased from Gunda Subbarayudu out of the immovable property possessed by me in Bezwada town on condition of including them in the half share of the property that shall pass to my son after my life-time.
>
> 5. The said Krishnaveni shall be at liberty to take possession of the two properties mentioned in paragraph 4 above, to pay all kinds of taxes payable thereon and to enjoy freely throughout her lifetime only the income got every year from the said two properties without powers of gift, mortgage exchange and sale by following the age-old custom and by maintaining the family respect and custom and the said two properties shall pass to my son Pulla Rao *alias* Venkatasatyanarayana after her lifetime.
>
> 8. My younger brother Lakshmi Perumallu shall keep the remaining entire property joint till my son Pulla Rao *alias* Venkatasatyanarayana attains majority and manage the same, shall bring up the boy properly, celebrate the marriage and other auspicious functions and divide the half share of the property after he attains majority and deliver possession of the same to my son. ".

It seems to us difficult to infer from the recitals in these paragraphs that Sitaramaiah had expressed his unequivocal intention to get separated in status. No doubt, in the 4th paragraph he has observed that in certain circumstances certain property will be included in the half share of the property that would pass to his son after his death and he has also said in paragraph 5 that the plaintiff shall be at liberty to take possession of the two properties indicated in paragraph 4, enjoy them during her lifetime and that on her death they will pass to Pulla Rao. But in paragraph 6 he has referred to the remaining property as " joint property ", and has repeated that in paragraph 7. Again, what he has said in paragraph 8 militates wholly against the inference of separation in status. There he has enjoined upon the defendant to keep the remaining property joint till Pulla Rao attained majority, manage the same and divide that property between himself and Pulla Rao after the latter attained majority. Nowhere in the will has he stated that he wanted to put an end to the coparcenary. Indeed the very assertion which has been concurrently found to be untrue that the property was not joint family property would preclude an inference that Sitaramaiah intended to express his intention to separate in status and put an end to a coparcenary which, according to that assertion, in fact did not exist. In the circumstances we cannot accept the first contention of Mr. Desai.

No doubt, a family arrangement which is for the benefit of the family generally can be enforced in a Court of law. But before the Court would do so, it must be shown that there was an occasion for effecting a family arrangement and that it

1. (1964) 2 S.C.R. 933 : A.I.R. 1964 S.C. 136.

was acted upon. It is quite clear that there is complete absence of evidence to show that there was such an occasion or the arrangement indicated in the will was acted upon. The letter Exhibit B-12 upon which reliance was placed before the High Court on behalf of the defendant has not been found by it to be genuine. The defendant had also pleaded that the provisions under the will were given effect to but no satisfactory evidence has been adduced to prove that the plaintiff was in enjoyment of the properties allotted to her under the will. We cannot, therefore, accept the second contention of Mr. Desai.

Coming to the last question there is a certain amount of conflict in the decisions of the various High Courts. One view is that the quantum of interest to which a Hindu widow is entitled under section 3 (2) of the Hindu Women's Rights to Property Act, 1937 is to be determined as on the date on which she seeks to enforce partition under sub-section (3) of section 3. The other view is that it has to be determined as on the date on which her husband died, that is to say, that it is not a fluctuating interest increasing or decreasing as a result of deaths or births in the family.

The first mentioned view has been stated with approval in Mulla's Principles of Hindu Law, 12th edition and it is stated at pages 109-110:

"The share which devolves on a widow of a deceased coparcener is not a fixed and determinate share but what she takes is the 'same interest as he himself had.' Therefore until there is partition, she cannot predicate the particular fraction of her share for it is likely to increase or decrease by birth or death of other coparceners. Her share would include a share in accretions to the joint family property till partition is effected. Prior to the Act, a widow was entitled to a share in partition among her sons in her capacity as a mother (except in Madras). It has been held in a number of cases that after the Act the widow cannot claim a double share on partition between the sons, one in her capacity as a widow and another as a mother. Under the prior law, stridhan acquired by a female from her husband or father-in-law was taken into account when a share was allotted to her on partition amongst the sons. The share she gets under section 3 (2) is not affected by any rule of Hindu law to the contrary and it has been held in a Nagpur case that such stridhan received by her would not be deducted from her share on partition."

In support of this statement in law reliance has been placed upon the following decisions:

Nagappa v. *Mukambe*[1]; *Mahadu* v. *Gajarabai*[2]; *Sivappa* v. *Yellawa*[3]; *Gangadhar* v. *Subhashini*[4]; *Tukaram* v. *Gangi*[5]; *Ramchandra* v. *Ramgopal*[6]; *Hanuman* v. *Tulsabai*[7].

In addition to these decisions our attention was also invited to *Gurudayal* v. *Sarju*[8]; *Kamal Kishore* v. *Harihar*[9]; *Sabuipari* v. *Satrughan Isser*[10]; *Nagappa Narayan* v. *Mukumbekom Venkataraman*[11]; *Mahadu Kashiba* v. *Gajarabai Shankar*[12]; *Movva Subba Rao* v. *Movva Krishna Prasadam*[13]; *Parappa* v. *Nagamma*[14]; *Manicka* v. *Arunachala*[15]; *Harekrishna* v. *Jujesthi*[16]; *Kelumi* v. *Jagabandhu*[17]; *The Indian Leaf Tobacco Development Co., Ltd.* v. *K. Kotayya*[18]; *Laxman* v. *Gangabai*[19]; *Bhondu* v. *Ramdayal*[20]; *Ratan Kumari* v. *Sunder Lal*.[21]

The High Court itself referred to the decision in *Parappa* v. *Nagamma*[7] which is a decision of the Full Bench constituted for resolving an apparent conflict between the decisions in *Chinniah Chettiar's Case*[22] and *Subba Naicker* v. *Nallammal*.[23] In the opinion of the Full Bench there was really no conflict between the two decisions and that "the right conferred by the Hindu Women's Right to

1. I.L.R. (1951) Bom. 442: A.I.R. 1951 Bom. 309.
2. I.L.R. (1954) Bom. 885.
3. I.L.R. (1953) Bom. 958.
4. I.L.R. (1955) Cut. 61: A.I.R. 1955 Ori. 135.
5. A.I.R. 1957 Nag. 28.
6. A.I.R. 1956 Nag. 228.
7. A.I.R. 1956 Nag. 63.
8. A.I.R. 1952 Nagpur 43.
9. (1951) I.L.R. 30 Pat. 357.
10. A.I.R. 1958 Patna 405.
11. I.L.R. 1951 Bom. 442: A.I.R. 1951 Bom. 309.
12. I.L.R. 1954 Bom. 885.
13. I.L.R. 1954 Mad. 257: (1953) 2 M.L.J. 561.
14. I.L.R. 1954 Mad. 183: (1954) 1 M.L.J. 250 (F.B.).
15. I.L.R. (1961) Mad. 1016: (1961) 2 M.L.J. 483.
16. I.L.R. 1955 Cuttak 709: A.I.R. 1956 Orissa 73.
17. A.I.R. 1958 Orissa 47.
18. A.I.R. 1955 Andhra 135.
19. I.L.R. 1955 M.B. 282.
20. A.I.R. 1960 M.P. 51.
21. A.I.R. 1959 Cal. 787.
22. I.L.R. (1945) Mad. 402: (1944) 2 M.L.J. 262.
23. (1949) 2 M.L.J. 536.

Property Act was a new right in modification of the pre-existing one. The Full Bench further held that section 3 (2) of the Act does not bring about a severance of interest of the deceased coparcener, that his widow is not raised to the status of a coparcener though she continues to be a member of the joint Hindu family as she was before the Act, that the joint family would continue to exist as before subject only to her statutory rights and that the rights of the other members of the family would be worked out on the basis that the husband died on the date when the widow passed away, the right to survivorship being suspended till then. Further according to the Full Bench a widow can under the Act claim a share not only in the property owned and possessed by the family at the time of his death but also in the accretions arising therefrom, irrespective of the character of the accretions. The various decisions to which we have adverted rest on the view that the interest which the law has conferred upon the widow is a new kind of interest though in character it is what is commonly known as the Hindu widow's estate. This interest is in substitution of her right under the pre-existing Hindu law to claim maintenance. The decisions also recognise that though the widow does not, by virtue of the interest given to her by the new law become a coparcener she being entitled to claim partition of the joint family property is in the same position in which her deceased husband would have been in the matter of exercise of that right. That is to say, according to those decisions her interest is a fluctuating one and is liable to increase or decrease according as there are deaths in or additions to the members of the family or according as there are accretions to or diminutions of the property. In our opinion these decisions lay down the law correctly. To hold, as contended for by Mr. Desai and as would appear from the two decisions upon which reliance was placed by him before us—*Jadaobai* v. *Puranmal*[1] and *Siveshwar Prasad* v. *Lala Har Narain*[2], would mean that whenever a coparcener in a Hindu joint family dies leaving a widow a disruption takes place in the family ! For, unless a disruption is deemed to take place, it would not be possible for the widow's share to be crystallised. The argument of Mr. Desai, however, is that the words in the Act " his widow shall subject to the provisions of sub-section (3) have in the property the same interest as he himself had " can only mean the interest which the deceased coparcener had at the moment of his death and the words " shall be the limited interest known as a Hindu woman's estate " show that the nature of her interest was to be the same as already recognised by the Hindu law. The Legislature did not, he says, intend to create a new kind of interest nor to make her a coparcener. Undoubtedly she does not become a coparcener, though her interest in the family property is to be the same as that of her deceased husband except that in extent it is to be that of a Hindu widow. (Now, of course, it has been enlarged by section 14 of the Hindu Succession Act, 1956.) But a coparcener has no defined interest in the joint family property and the right which he has is to claim for partition. The quantum of his interest would be determinable with reference to the date on which such member unequivocally declares his intention to separate and thus put an end to the coparcenary. It cannot even be suggested that the event of the death of a coparcener is not (*sic*) tantamount to an unequivocal declaration by him to separate from the family. According to the theory underlying the Hindu law the widow of a deceased Hindu is his surviving half and therefore as long as she is alive he must be deemed to continue to exist in her person. This surviving half had under the Hindu law texts no rights to claim a partition of the property of the family to which her husband belonged. But the Act of 1937 has conferred that right upon her. When the Act says that she will have the same right as her husband had it clearly means that she would be entitled to be allotted the same share as her husband would have been entitled to had he lived on the date on which she claimed partition.

Jadaobai's case[3] in which a different view has been taken and on which reliance has been placed by Mr. Desai may now be considered. In that case it was contended that the widow does not take any property by succession and, therefore, she

1. I.L.R. 1944 Nag. 832.
2. (1944) I.L.R. 23 Patna 760.
3. I.L.R. 1944 Nagpur 832.

is not liable to produce a succession certificate for the execution of a decree obtained by her husband. In support of this contention reliance was placed on behalf of the widow upon the decision in *Natarajan Chettiar* v. *Perumal Ammal*[1]. In that case Horwill, J., observed as follows :

"The widow does not obtain the right given under this section (section 3 of the Hindu Women's Rights to Property Act, 1937) by survivorship. She was not a coparcener before her husband's death and she was not one afterwards. I do not however think that it follows that because the widow does not obtain her right by survivorship that she must obtain it by inheritance. The effect of section 3, clauses (2) and (3) may be regarded as a survival of the husband's *persona* in the wife, giving her the same rights as her husband had except that she can alienate property only under certain circumstances. As the widow did not inherit her right, no succession certificate is necessary."

The learned Judges of the Nagpur High Court observed that a person can take the property of another either by survivorship or by succession and that if, as held in the Madras case, the widow of a deceased coparcener does not take it by survivorship the only way in which she could take it would be by succession. In the course of the judgment the learned Judges observed :

"Harwill, J., in the Madras case quoted above, is of the opinion that the mere fact that the widow does not obtain her right by survivorship does not lead to the conclusion that she obtains it by inheritance. If she does not claim it by inheritance we fail to understand how she is claiming it in the face of the clear wording of the Act. The observations that the effect of section 3, clauses (2) and (3), may be regarded as a survival of the husband's *persona* in the wife, giving her the same rights as her husband had except that she can alienate property only under certain circumstances, do not indicate very clearly what was really intended to be laid down. Survivorship having been ruled out the only other mode by which she will be clothed with the rights of her husband in the property, though to a limited extent, would be by succession or inheritance if she claims under the Hindu Women's Rights to Property Act."

It seems to us that the learned Judges were not quite correct in saying that the property of one person can, on his death, devolve on another only by survivorship or by inheritance and in no other way. For, it is competent for the Legislature to confer a right on a person to get the property of another on the latter's death in certain circumstances. This is precisely what has been done by the Legislature in enacting section 3, sub-section (2) of the Hindu Women's Right to Property Act. Adverting to the aforesaid decision it was observed by another Division Bench of the same High Court in *Gurdayal* v. *Sarju*[2] :

"Reliance was, however, placed for the defendants on *Jadaobai* v. *Puranmal*[3] where a Division Bench of this Court held that the interest of the husband devolves on the widow by inheritance and not by survivorship. We have no quarrel with that. It does not matter for the purposes of this case how the interest which the Hindu Women's Rights to Property Act gives Sarjubai devolved on her. The question is: of what does that interest consist. Even if it devolves on her by inheritance the interest is, according to the Act, 'the same interest as the husband had,' and 'the same right of claiming a partition as a male owner. Whether this right devolved on Sarjubai by way of inheritance, or by succession, or whether because of the Act, as a statutory right, would make no difference. The right is the same as that of a male owner and the interest is the same as her husband had. For these limited purposes she merely steps into his shoes and can be regarded as a continuation of himself."

In the next case relied upon, *Siveshwar Prasad* v. *Lala Har Narain*[4] a Division Bench has held that the interest which is acquired by a widow under the Hindu Women's Rights to Property Act, 1937 is not as a survivor but as an heir of her husband. The interest, therefore, is an asset of her husband in her hands and can be proceeded against by a creditor even though it may be an undivided interest in a joint family property. It is difficult to appreciate how this decision is of assistance to the appellant. No doubt, the husband's interest does not devolve on the widow by survivorship but it does not follow from that that the husband's interest gets crystallised at the moment of his death and that it is to this interest that the widow succeeds. On the other hand the view of the learned Judges that the husband's interest is liable to be attached at the instance of the husband's creditors despite its devolution on the widow seems to accord with the view that the widow takes the husband's interest as the surviving half of the husband. A passing reference was also made by learned Counsel to *Rajendrabati* v. *Mungalal*[5]. The question for consideration in that case was the same as in *Jadaobai's case*[3] and the High Court relying upon

1. (1942) 2 M.L.J. 668 : A.I.R. 1943 Mad. 246.
2. A.I.R. 1952 Nagpur 43.
3. I.L.R. (1944) Nagpur 832.
4. (1944) I.L.R. 23 Patna 760.
5. (1952) I.L.R. 31 Patna 475.

its earlier decision held that the provisions of section 214 of the Indian Succession Act, 1925 were attracted, the suit being one for the recovery of her share of the money due to the joint family of which her deceased husband was a member. In the course of the argument reliance was placed on a decision of the Madras High Court in which it was held that under section 3 of the Hindu Women's Right to Property Act a widow of a deceased coparcener in a joint Hindu family becomes entitled to a right not as an heir but by statute and that she stands in the shoes of her deceased husband and continues to be a member of the joint family. This argument was rejected by the learned Judges who observed :

> "With the greatest respect I cannot accept this proposition specially in view of the principles which have been so definitely laid down in two Bench decisions of this Court referred to above. The lady may be regarded as a member of the joint family but as has been pointed out by this Court the interest which devolves upon her after the death of the last male holder, must be regarded as an interest descending to her as an heir, and as soon as it is held that she acquires her interest as an heir section 214 of the Succession Act would come into play and no decree can be passed in her favour unless she produces a succession certificate."

As we have already pointed out the interest devolving upon the widow need not necessarily be either by survivorship or by inheritance but could also be in a third way, *i.e.*, by statute and where the interest is taken by her under a statute no further difficulty arises.

We are, therefore, clearly of the view that the High Court was right in allotting to the respondent half share in the family property at its partition. Accordingly we affirm its decree and dismiss the appeal with costs.

V.K. *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

Pentakota Sriramulu .. *Appellant* *

v.

The Co-operative Marketing Society, Ltd., Anakapalli and another .. *Respondents.*

Madras Co-operative Societies Act (VI of 1932), sections 49 and 50—Scope—Section 49 when attracted—Disputes arising out of illegal transactions—If a "dispute touching business of the society" within section 51—Commission earned by society from illegal transactions and retained by the members of the management—If can be recovered by the society.

It is true that in *Sunderam Iyer* v. *The Deputy Registrar of Co-operative Societies*, I.L.R. (1957) Mad. 371: (1956) 2 M.L.J. 613 it was held that where a matter falls within the purview of both sections 49 and 51 of the Madras Co-operative Societies Act, the Registrar has to proceed only under section 49 and not under section 51. But a claim "against a person in management of a co-operative society" and "for the fraudulent retention of money or other property of the co-operative society" will not fall under section 49. Besides the two factors referred to above there is also another condition which has to be satisfied before section 49 could be attracted. The facts giving rise to the claim have to be disclosed in the course of an audit under section 37 or an enquiry under section 38 or an inspection under section 39 or on the winding up of the society. The fact that there was an enquiry under section 38 before the claim was made will not be sufficient by itself. It has further to be proved that the facts alleged in the claim and on which it is based were disclosed at that enquiry. This can be proved only by the production of the enquiry report. In the absence of such proof the order of the Registrar referring the matter for adjudication under section 51 cannot be assailed on the ground that he should have proceeded only under section 49.

Where it was alleged that the members of a co-operative society, constituted mainly for the purpose of arranging for the sale of agricultural produce of its members the society being entitled to commission on the turnover of sales so effected, sold jaggery at prices higher than that fixed under the Gur Control Order (1950) and that while the amount of commission payable on the basis of the controlled prices was credited to the society, the commission earned in respect of the extra price was not brought to the credit of the society but was appropriated by the member of the management of the society and on

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* C.A. No. 193 of 1962. 28th August, 1964.

the basis of the above allegations a claim was made against the President of the society to account for the commission so retained ;

Held, the dispute about the retention of money belonging to the society was a " dispute touching the business of the society " within the meaning of section 51 and so it fell within the purview of that section though the claim itself arose out of alleged illegal transactions of sales effected in contravention of the Gur Control Order.

The society was entitled to call upon the President to account for the commission earned through the sales effected by the society though they were alleged to be illegal transactions. No illegality attached to the contract between the President and the society ; that was perfectly legal. It arose out of his position as the President of the Society and he was in law, bound to account for the moneys received on behalf of the society. The fact that he entered into illegal transactions would have no bearing on the right of the society to make the claim for an account of the commission due to the society which is unjustly withheld.

Appeal by Special Leave from the Judgment and Order dated the 18th August 1959, of the Andhra Pradesh High Court in Writ Appeal No. 111 of 1957.

A. V. V. Nair and *P. Ram Reddy*, Advocates, for Appellant.

Naunit Lal, Advocate, for Respondent No. 1.

K. R. Chaudhuri and *B. R. G. K. Achar*, Advocates, for Respondent No. 2.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—The appellant was the President of the Anakapalli Co-operative Marketing Society, Ltd.—a society constituted mainly for the purpose of enabling its members to obtain credit facilities and to arrange for the sale of agricultural products at reasonable prices. There were complaints regarding the working of the society and accordingly an enquiry was instituted into its affairs by the Registrar of Co-operative Societies, Madras at a time when Anakapalli, now in Andhra Pradesh, was in the State of Madras. As a result of the facts disclosed in the inquiry the Committee then in management of the society was, after due notice to show cause and a hearing, superseded by order of the Registrar dated 15th February, 1952, such supersession being authorised by section 43 of the Madras Co-operative Societies Act (VI of 1932) hereinafter called the Act. A special officer was appointed to take charge of the affairs of the society and this officer filed a claim before the Registrar, *inter alia*, against the appellant. The amount claimed was Rs. 13,000 and odd and details were given as to how this sum was made up. The main item of the claim was commission stated to have been actually earned by the society on the sales effected by it of jaggery belonging to its producer-members but which was not credited to the society. On receipt of this claim the Registrar appointed, under section 51 (2) of the Act, the Deputy Registrar of Co-operative Societies, Visakhapatnam to act as an arbitrator to adjudicate the claim.

Immediately this order was passed the appellant filed a petition in the High Court of Andhra Pradesh for the issue of a writ of prohibition under Article 226 of the Constitution, prohibiting the Deputy Registrar from dealing with the claim which he was directed to try. The learned Single Judge who heard the petition allowed the petition and granted the appellant the relief he sought. The Co-operative Society took the latter in appeal to the Division Bench of the High Court which allowed the appeal and dismissed the writ petition. Thereafter the appellant moved this Court for Special Leave certificate of fitness having been refused by the High Court and has preferred the present appeal.

Before adverting to the arguments addressed to us by Mr. Ram Reddy, learned Counsel for the appellant, it is necessary to state a few facts concerning the transactions which have given rise to these proceedings. The Co-operative Society of which the appellant was the President till November, 1951 held a licence under the Madras General Sales Tax Act for doing business as a commission agent and the society was earning commission on the turnover of the sales effected of the agricultural produce of its members and others. In October, 1950 the Government of India promulgated the Gur Control Order fixing the maximum price at which gur could be sold in different States. The prices fixed varied from State to State. The prices fixed for sale at Anakapalli, then in the State of Madras, were some-

what lower than those which had been fixed in other States. This gave occasion for the members of the society to sell their jaggery at higher prices than fixed because there was demand for jaggery from merchants at prices higher than the controlled price. It was alleged that while on paper the transactions entered into between the members of the society and the purchasers showed sales at the prices fixed by law, in reality, higher prices were charged. As stated already, the society was entitled to charge commission on the sales effected through it. As regards this it was stated that commission was earned on the entire price at which the gur was sold, and while the amount of commission payable on the basis of controlled prices was credited to the society, the commission earned in respect of the extra price which its members obtained, was, it was stated, not brought to the credit of the society in its accounts but appropriated by members of the management. These were the allegations and it is on the basis of these allegations that the claim against the appellant and others had been made. Their correctness have yet to be tested in the arbitration proceedings.

When this claim was made, *inter alia*, against the appellant, *viz.*, of not bringing into the society's accounts moneys due to the society and which had been earned through sales effected by the society, he filed, as narrated before, a writ petition and there raised three points in challenge of the legality of the reference to the Deputy Registrar to enquire into and determine the claim. The first was that the transaction on the basis of which the claim was said to have arisen was illegal being contrary to the Gur Control Order issued by the Central Government under the Essential Supplies Act and such an illegal transaction could not fall within the words "Dispute touching the business of the society" which alone could be referred to arbitration under section 51 of the Act. (2) The second was that the reference by the Registrar of the dispute to the arbitration of the Deputy Registrar was illegal as contrary to natural justice, because (*a*) the Deputy Registrar had conducted an enquiry which had resulted in the supersession of the management of the Society under section 43 of the Act, and (*b*) the Deputy Registrar being a subordinate of the Registrar could not be expected to act fairly in this matter. (3) Lastly, that the Registrar should, in this case, have proceeded under section 49 of the Act and not under section 51, the former being more advantageous to him, in that he could challenge any final order against him by resort to the Civil Courts, whereas an award under section 51 was subject to departmental appeals and could not be questioned in a Civil Court. The learned Single Judge rejected the second and the third points but upheld the first. His reasoning was that the transaction of sale above the controlled price was illegal, that illegality was a bar to a claim for accounting by the Society against its officer or agent, notwithstanding that the contract of agency itself was not illegal. On appeal the learned Judges of the High Court have, as stated earlier, rejected all the three points urged on behalf of the appellant.

Mr. Ram Reddy—learned Counsel for the appellant raised before us three points. The first of them was that the Registrar should have proceeded under section 49 and not under section 51 of the Act. Section 49, which learned Counsel says, was attracted to the case runs, to quote only the material provision :

"49. (1) Where in the course of an audit under section 37 or, an inquiry under section 38 or an inspection under section 39 or the winding up of a society, it appears that any person who has taken part in the organization or management of the society or any past or present officer of the society has misappropriated or fraudulently retained any money or other property or been guilty of breach of trust in relation to the society, the Registrar may, of his own motion or on the application of the committee or liquidator or of any creditor or contributory, examine into the conduct of such person or officer and make an order requiring him to repay or restore the money or property or any part thereof with interest at such rate as the Registrar thinks just or to contribute such sum to the assets of the society by way of compensation in respect of the misappropriation, fraudulent retention or breach of trust as the Registrar thinks just.

(2) The order of the Registrar under sub-section (1) shall be final unless it is set aside by the District Court having jurisdiction over the area in which the headquarters of the society are situated or if the headquarters of the society are situated in the City of Madras, by the City Civil Court, on application made by the party aggrieved within three months of the date of receipt of the order by him."

and section 51—the other provision—runs :

"ARBITRATION :

51-*Disputes.*—(1) If any dispute touching the business of a registered society (other than a dispute regarding disciplinary action taken by the society or its committee against a paid servant of the society) arises—

(*a*) ....

(*b*) ....

(*c*) between the society or its committee and any past committee, any officer, agent or servant, or any past officer, past agent or past servant, or the nominee, heirs or legal representatives of any deceased officer, deceased agent or deceased servant, of the society, or

(*d*) ....

Explanation.—A claim by a registered society for any debt or demand due to it from a member, past member or the nominee, heir or legal representative of a deceased member, whether such debt or demand be admitted or not, is a dispute touching the business of the society within the meaning of this sub-section.

(2) The Registrar may, on receipt of such reference,—

(*a*) decide the dispute himself, or

(*b*) transfer it for disposal to any person who has been invested by the (State Government) with powers in that behalf, or

(*c*) subject to such rules as may be prescribed, refer it for disposal to an arbitrator or arbitrators."

In this connection learned Counsel relied on a decision of the Madras High Court in *Sundaram Iyer* v. *The Deputy Registrar of Co-operative Societies*[1]. There it was held that it was only in cases where the provisions of section 49 were inapplicable that recourse could be had to section 51. In cases where a matter fell both within sections 49 and 51, the two provisions were not intended to operate on parallel lines. As section 51 excluded the jurisdiction of civil Courts, it must be strictly construed and for that reason, in cases where section 49 was applicable, section 51 would be excluded. Further, it was held section 51 was of a general nature providing for a variety of matters and was almost exhaustive of the parties between whom as well as the disputes that could arise in co-operative societies. Section 49 on the other hand dealt with special types of disputes which arise in exceptional circumstances, segregated out of the larger group dealt with under section 51. When there was thus an overlapping of the terms of both the sections the provisions of section 49 alone it was held would be applicable. Based on this line of reasoning, the submission of learned Counsel was that the claim in the present case was one "against a person in management of the society" and "for the fraudulent retention of money or other property of the society" and, therefore, it was completely covered by section 49 and that in consequence the Registrar had no jurisdiction to direct an enquiry by the Deputy Registrar under section 51 of the Act. This argument, however, proceeds on ignoring one further essential requisite for the application of section 49 (1). Besides the two factors to which learned Counsel referred and which we have just set out, there is also another condition which has to be satisfied before section 49 (1) could be attracted. The facts giving rise to the charge have to be disclosed in the course of an audit under section 37 or an enquiry under section 38 or an inspection under section 39 or on the winding up of the society. Mr. Ram Reddy while not disputing that unless this condition is also satisfied section 49 would not be attracted, however submitted that there was an enquiry under section 38 preceding the supersession and that in consequence the condition was fulfilled. It is true that there was an enquiry conducted into the affairs of the society under section 38, but that by itself is not sufficient. It has further to be proved that the facts alleged in the claim, and on which it is based, were disclosed at that enquiry. This can be proved or established only if the enquiry report which was submitted to the Registrar was placed before the Court and the facts disclosed therein corresponded with the facts alleged in the statement of claim. Mr. Ram Reddy admitted that the enquiry report was not before the

1. (1956) 2 M.L.J. 613 : I.L.R. (1957) Mad. 371.

Court and is not in the record of these proceedings. It is not, therefore, possible to say that there is correspondence between the facts disclosed in that report as a result of the enquiry under section 38 and those found in the statement of claim which was referred by the Registrar to the Deputy Registrar for arbitration under section 51. The case must, therefore, be held not to fall under section 49 of the Act. There can be no doubt that if section 49 does not apply, subject to the other argument about illegality to which we shall advert, the order of the Registrar proceeding under section 51 is not open to objection. This first point, therefore, has to be rejected.

The next contention of learned Counsel was that the dispute about the retention of money belonging to the society by the appellant was not " a dispute touching the business of the society". The argument was that the expression " business of the society " included only what was legally permissible. In so far as it impinges on the third point urged by learned Counsel activity out of which the claim against the appellant was alleged to arise involved a contravention of the Gur Control Order it was not " a dispute touching the business of the society". We are unable to agree with this submission. In so far as it impinges on the third point urged by learned Counsel based on the maxim *ex turpi causa non oritur actio* we shall deal with it in considering that submission. But that apart, we do not see any basis for the argument that the claim made before the arbitrator was not a dispute touching the business of the society. It could not be disputed that the sale of the produce belonging to the members of the society was part of the business of the society, and then the charging of commission for those sales and the crediting of the society's accounts with that commission would equally be the business of the society. Apart, therefore, from the question of illegality raised by reason of the sale being at prices in excess of the controlled price, it is not capable of argument that the failure on the part of the appellant to credit to the society the full amount of commission due on the sales effected by him on behalf of the society and the resistance by him of that demand, would not be a dispute touching the business of the society. This objection is clearly without substance and must be rejected.

The last of the points urged by learned Counsel was that the transaction of sale which gave rise to the commission alleged to be improperly retained was illegal and that therefore the society could not, in law, make a claim on the basis of such an illegal transaction. We see no substance in this point either. No illegality attached to the contract between the appellant and the society ; that was perfectly legal. It arose out of his position as the President of the society and he was, in law, bound to account for the moneys he received on behalf of the society. The fact that he entered into illegal transactions would have no bearing on the right of the society to make the claim for an account of the commission due to the society which he unjustly withheld. We conider the reasoning of the learned Judges of the Division Bench rejecting this argument to be correct. Moreover this matter has been examined by this Court in a decision reported as *Kedar Nath Motani* v. *Prahlad Rai*[1] and in view of this decision learned Counsel for the appellant did not himself press this point very seriously.

Before parting with this case, however, there is one matter to which it is necessary to advert. The learned Judges, after allowing the appeal of the society, stated in their judgment :

" Lastly, we must observe that this Court is averse to lend its helping hand to persons who want to defraud others. Even assuming that any error of law was committed by tribunals, that would not be a ground for invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution, when it is not in furtherance of justice but tends to encourage dishonesty."

Mr. Ram Reddy pointed out to us that the correctness of the allegations made in the claim filed before the arbitrator have yet to be decided and there was, therefore no justification for the learned Judges assuming that the facts stated therein were proved and that the appellant had been guilty of fraud or dishonesty in his con-

1. (1960) S.C.J. 1072 : (1960) 1 S.C.R. 861.

duct of the business of the society. We see force in this complaint of learned Counsel. In the circumstances, we would add that, having regard to the stage at which the matter was before the Court, the learned Judges were in error in making these observations. It is clear that they did not intend to prejudice the appellant in his defence before the Deputy Registrar in the arbitration proceedings under section 51 of the Act but it is possible that it might have such an effect. What we have said earlier must suffice to dispel any such apprehension or effect.

The appeal fails and is dismissed with costs.

V.K. *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

Mukund Deo (dead) represented by his legal representatives Kasi Bai and others .. *Appellants**

v.

Mahadu and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *section* 100—*Hyderabad Civil Procedure Code* (*XXXI of* 1323 *Fasli*), *section* 602—*Right of appeal to a particular forum—Nature of—Effect of alteration in law—Suit under Hyderabad Code—Subsequent supersession of Hyderabad Code by Civil Procedure Code* (*V of* 1908)—*Second appeal in suit if governed by former or latter Code.*

Constitution of India (1950), *Article* 136—*Appeal by Special Leave—Interference with findings of fact of High Court—Practice.*

It is true that as a general rule, alterations in the law of procedure are retrospective, but a right of appeal to a particular forum is a substantive right and is not lost by alteration in the law, unless provision is made expressly in that behalf, or a necessary implication arises.

There is nothing in the Act which applies the Civil Procedure Code (V of 1908) to the territory of the State of Hyderabad which either expressly or by necessary implication invests section 100 of the Code with retrospective operation. Hence section 100 of the Civil Procedure Code (V of 1908) will govern Second Appeals only in the cases instituted in the Court of first instance on or after 1st April, 1951, when the Hyderabad Civil Procedure Code (XXXI of 1323 Fasli) was repealed and the Civil Procedure Code (V of 1908) was extended to the Part 'B' State of Hyderabad. The jurisdiction of the High Court in Second Appeals with respect to cases instituted in the State of Hyderabad before 1st April, 1951, would continue to be governed by section 602 of the Hyderabad Code. To such cases the restriction contained in section 100 of the Central Code *viz.*, that the High Court in Second Appeal cannot set aside a finding of fact recorded by the first appellate Court, will not apply no such restriction being found in section 602 of the Hyderabad Code.

In an appeal with Special Leave under Article 136 of the Constitution of India the Supreme Court will not ordinarily discard the findings of the High Court on what is essentially a question of fact and on which question the Court was competent under the law governing the appeal before it to arrive.

Appeal by Special Leave from the Judgment and Decree dated the 17th July, 1953, of the Andhra Pradesh High Court in Second Appeal No. 544 of 1357 Fasli.

G. S. Pathak, Senior Advocate (*R. Ganapathy Iyer*, Advocate, with him), for Appellants.

B. R. L. Iyengar, S. K. Mehta and *K. L. Mehta*, Advocates, for Respondents Nos. 1 to 4.

The Judgment of the Court was delivered by

Shah, J.:—This appeal relates to lands which originally belonged to one Beli Ram, son of Ananda. Beli Ram died leaving him surviving his wife Rukhma Bai and his daughter Vitha Bai, and on his death his property devolved upon Rukhma Bai as a limited owner. By a deed dated 26th July, 1916, Rukhma Bai sold the lands to one Mukund Deo for Rs. 600 (O.S.) and delivered possession of the lands to the vendee. Rukhma Bai died in 1940. The respondents to this appeal who

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* C.A. No. 406 of 1962. 31st August, 1964.

were the sons of Vitha Bai commenced on 21st February, 1944, an action against the transferee Mukund Deo in the Court of the Munsiff, Mominabad Taluk, for a decree for possession of the lands sold by Rukhma Bai. They alleged in their plaint that they were governed by the *Mayukha* school of Hindu Law, that the sale of the lands by Rukhma Bai was not supported by legal necessity and that on the death of Rukhma Bai they became entitled to the lands as the nearest reversioners to the estate of Beli Ram. Mukund Deo contested the claim contending, *inter alia*, that the sale by Rukhma Bai was for legal necessity, that Vitha Bai had survived Rukhma Bai and that Vitha Bai had during her lifetime assented to the alienation and had thereafter filed a suit for declaration that the sale was not binding upon her but had withdrawn the same after entering into a compromise with Mukund Deo, admitting his title to the lands. The trial Court rejected the contentions raised by Mukund Deo. The Court held that the sale was not for purposes of legal necessity, that Vitha Bai had predeceased Rukhma Bai, and that the plaintiffs as the nearest reversioners to the estate of Beli Ram on the death of Rukhma Bai were entitled to a decree for possession as claimed. In appeal to the Additional Sub-Judge, Mominabad, the decree of the trial Court was reversed. The learned Appellate Judge held that the sale was supported by legal necessity and that in any event as Vitha Bai had during the lifetime of Rukhma Bai attempted to impeach the alienation in favour of Mukund Deo, and had thereafter entered into a compromise admitting Mukund Deo's title and acknowledging the validity of the sale, the plaintiffs who could only claim as heirs to Vitha Bai who had survived her mother Rukhma Bai had no valid claim to the lands.

In Second Appeal No. 544 of 1947 the High Court of Hyderabad by judgment dated 17th July, 1953, reversed the decree of the First Appellate Court and restored the decree of the trial Court. In the view of the High Court, Mukund Deo failed to establish that the sale was for legal necessity. The High Court also held that the conduct of Vitha Bai in entering into a compromise and withdrawing her declaratory suit could not confer a valid title on Mukund Deo. They further held that the testimony of the witnesses for the plaintiffs that Vitha Bai had predeceased Rukhma Bai was "preferable" to the evidence led by the defendant Mukund Deo. With Special Leave, the heirs and the legal representatives of Mukund Deo who died since the decree of the High Court have preferred this appeal.

The High Court disagreed with the view of the First Appellate Court on the question whether the sale to Mukund Deo was supported by legal necessity and also on the question whether Vitha Bai had predeceased Rukhma Bai. Counsel for the appellants argued that the High Court had, in Second Appeal, no jurisdiction to set aside the finding of fact recorded by the First Appellate Court. In so arguing. Counsel assumed that the jurisdiction of the High Court in deciding the Second Appeal before it was derived from section 100, Code of Civil Procedure, 1908. That assumption is, however, not true. When the suit was filed the lands in dispute were situate within the territory of H.E.H. the Nizam of Hyderabad, and the suit filed by the respondents had to be heard and disposed of according to the relevant provisions of the Code of Civil Procedure in force in the State of Hyderabad. The Hyderabad Civil Procedure Code (Act XXXI of 1323 Fasli) was enacted in the Urdu language, and the following is a rendering into English of the material part of section 602 of that Code, which has been accepted by Counsel appearing before us as correct :

Section 602. Except as otherwise provided in this Code, or by express order in any other law a Second Appeal shall lie to the High Court from every decree which is passed in first appeal by any Court subordinate to the High Court. * * * *

It is clear that under that Code a Second Appeal lay to the High Court on questions of fact as well as of law. Counsel for the appellants concedes that this was the position in law at the date when the suit was instituted. But he says that the Hyderabad Code of Civil Procedure was repealed, and the Code of Civil Procedure (Act V of 1908) was extended on 1st April, 1951, to the Part 'B' State of Hyderabad after it became part of the Indian Union and the power to hear and decide the Second Appeal before the High Court was derived from section 100 of the Code of Civil Procedure (Act V of 1908), and the High Court could not set aside the findings of fact recorded

by the First Appellate Court. We are unable to agree with this contention. It is true that as a general rule, alterations in the law of procedure are retrospective, but a right of appeal to a particular forum is a substantive right and is not lost by alteration in the law, unless provision is made expressly in that behalf, or a necessary implication arises. In *Colonial Sugar Refining Co., Ltd.* v. *Irving*[1], Lord Macnaghten in delivering the judgment of the Judicial Committee observed :

The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellant at the date of the passing of the Act, or was it a mere matter of procedure ? It seems to their lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure."

In *Delhi Cloth and General Mills Co., Ltd.* v. *Income-tax Commissioner, Delhi*[2], the Judicial Committee denied to an aggrieved litigant a right to appeal to his Majesty in Council under section 66-A of the Indian Income-tax Act (which for the first time conferred a right of appeal against the judgment of a High Court) when the judgment of the High Court was delivered before the date on which the amendment was made. This Court has also held in *Garikapatti Veeraya* v. *N. Subbiah Choudhury*[3], that a vested right of appeal is a substantive right, and is governed by the law prevailing at the time of commencement of the suit, and comprises all successive rights of appeal from Court to Court, which really constitute one proceeding. Such a right may be taken away by a subsequent enactment expressly or by necessary intendment.

There is nothing in the Act which applies the Code of Civil Procedure, 1908' to the territory of the State of Hyderabad which either expressly or by necessary intendment invests section 100 of the Code with retrospective operation. The power of the High Court to deal with the appeal before it must, therefore, be derived from the Hyderabad Code, untrammelled by anything contained in section 100 of the Code of Civil Procedure, 1908. It is true that by section 100, Code of Civil Procedure, the power of the High Court in dealing with a Second Appeal was restricted, but the restriction could only apply to cases instituted in the Court of First Instance on or after 1st April, 1951, and the jurisdiction of the High Court would, in respect of cases instituted before that date, continue to be governed by section 602 of the Hyderabad Code of Civil Procedure.

Counsel for the appellants also contended that the finding of the High Court that Vitha Bai died before Rukhma Bai was based on no evidence. It is true that the High Court has not made an elaborate discussion on this part of the case, and has merely observed :

" As regards the question as to whether Vitha Bai predeceased Rukhma Bai we are in agreement with the trial Court that the evidence is more in favour of the conclusion that Vitha Bai predeceased Rukhma Bai."

The trial Court summarised the evidence of the witnesses of the plaintiffs and the defendant in some detail, and observed that the revenue record Exhibit 2 which was the copy of the order of the Tahsildar directing an enquiry to enter the names of the plaintiffs as the *Pattedars* and *Shikmidars* indicated that Vitha Bai could not have survived Rukhma Bai. The learned Judge observed that if Vitha Bai, had survived Rukhma Bai the name of Vitha Bai would have been entered in the revenue records and the plaintiffs would have been shown in the records as heirs of Vitha Bai. It is true that the evidence led by the planitiffs was not very strong. The trial Judge recognised this infirmity in the evidence, but in his view even though the plaintiffs' " evidence was shaky " compared to the evidence of defendant Mukund Deo, the plantiffs' evidence " was reliable to some extent." The learned Appellate Judge did not discuss the evidence led by the parties. He merely observed that the statements of Nagoba, witness No. 1 and Rama, witness No. 3 for the plaintiffs " deserved consideration" and that those witnesses had stated that the land had been retained by Rukhma Bai for her own livelihood and was given

1. L.R. (1905) A.C. 369.
2. L.R. 54 I.A. 451 : 53 M.L.J. 819.
3. (1957) 2 M.L.J. (S.C.) 1 : (1957) S.C.J. 439 : (1957) 2 An.W.R. (S.C.) 1 : (1957) S.C.R. 488.

after her death to her daughter Vitha Bai. From this he inferred that Rukhma Bai died first and Vitha Bai sometime thereafter. He expressed the view that if this was not correct the witnesses would have stated that on the death of Rukhma Bai, Vitha Bai inherited the field set apart for Rukhma Bai herself. In the view of the Appellate Judge, therefore the evidence of the plaintiffs' witnesses established that Vitha Bai had died after Rukhma Bai. We are unable to see how absence of any statement made by the plaintiffs' witnesses that Vitha Bai did no inherit the property was a circumstance from which an inference could be drawn in favour of the defendant. In any event the High Court has preferred the view taken by the trial Court and has refused to accept the view taken by the First Appellate Court and in an appeal with Special Leave under Article 136 of the Constitution this Court will not ordinarily discard the findings of the High Court on what is essentially a question of fact, and on which question the Court was competent under the law governing the appeal before it to arrive.

The appeal fails and is dismissed with costs.

V.K. ——— *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, J. C. SHAH, AND N. RAJAGOPALA AYYANGAR, JJ.

The Special Officer, Rent Reduction, Board of Revenue, Andhra Pradesh .. *Appellant**

v.

Katragadda Lakshminadha Rao Naidu .. *Respondent.*

Madras Estates Land (Reduction of Rent) Act (XXX of 1947), *section* 3-B (*introduced by Madras Estates Land (Reduction of Rent) (Andhra Pradesh Amendment) Act (IX of* 1960)—*Scope and effect—Section is prospective—Notification issued before the Amending Act came into force—Cannot be deemed to be one issued under section* 3-B—*Amending Act (IX of* 1960), *section* 5—*Applicability.*

Section 3-B of the Madras Estates Land (Reduction of Rent) Act (XXX of 1947) added by the Madras Estates Land (Reduction of Rent) (Andhra Pradesh Amendment) Act (IX of 1960)—is prospective in the sense that it empowers the State Government to take action of the sort contemplated by ection 3-B after the Amending Act comes into force. In other words, if the provision in section 3-B s relied upon, it merely enables the State Government to initiate proceedings for correction of errors in the orders made under section 3 (2) of the parent Act. A notification issued under the parent Act before the Amending Act came into force cannot, therefore, be deemed to be one which is either under is authorised by section 3-B.

Further, section 3-B contemplates a notice in which an alteration of an order under section 3 (2) is sought to be made on account of some error in the earlier order. Therefore a notification for the reduction of rent fixed under section 3 (2) which does not state that such reduction is sought to be made because of some error in the earlier fixation cannot be fitted into the frame of the modification permitted by section 3-B. Such a notice issued before section 3-B became law could not, in law, be treated as one issued with a view to action being taken under section 3-B. Such a notice cannot also be brought within the description of the proceeding validated by section 5 of the Amending Act.

Appeal by Special Leave from the Judgment and Order dated 23rd February, 1960 of the Andhra Pradesh High Court in Writ Petition No. 890 of 1957.†

H. N. Sanyal, Solicitor-General of India (*K. R. Chaudhuri* and *B. R. K. Achar*, Advocates, with him), for Appellant.

A. Ranganadham Chetty, Senior Advocate (*Veda Valli* and *A. V. Rangam*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—The Madras Legislature enacted Act XXX of 1947 entitled "The Madras Estates Land (Reduction of Rent) Act, 1947" which was designed, as recited in its Preamble,

* C.A. No. 789 of 1962. 9th September, 1964.

† (1960) 2 An. W.R. 133 (F.B.).

"to provide for the reduction of rents payable by ryots in estates governed by the Madras Estates Land Act, 1908, approximately to the level of the assessment levied on lands in ryotwari areas in the neighbourhood and for the collection of such rents exclusively by the State Government".

Section 2 of the enactment empowered the State Government to appoint a Special Officer for the purpose of recommending fair and equitable rates of rent for the ryoti lands in such estate or estates. The further provisions of that section prescribed the method to be adopted by the Special Officer for arriving at a fair and equitable rate of rent to be payable by the ryots in the estates. After the determination of the fair and equitable rent by the Special Officer, section 3 (1) provided for the Special Officer submitting his recommendation to the State Government through the Board of Revenue specifying (i) the extent, if any to which the rents for each class of such lands in each village or group of villages in the estate should in his opinion, be reduced and (ii) the rate of rent payable for each such class after such reduction. Provision is thereafter made for the consideration by the State Government of the recommendations of the Special Officer and the remarks of the Board of Revenue and thereafter the State Government is empowered in sub-section (2), by order published in the *Fort St. George Gazette*, to fix the rates of rent payable in respect of each class of ryoti land in each village in the estate. Sub-section (3) of section 3 enacted that an order made under sub-section (2) would take effect from the commencement of the Fasli year 1357. Section 8 of the Act might also be referred to in this context. That section reads as follows:

"8. The validity of the following orders and proceedings shall not be liable to be questioned in any Court of Law :—

(i) any order made under section 3, sub-section (2) ;

.... "

This enactment received the assent of the Governor on 6th January, 1948 and was published in the *Fort St. George Gazette* on 7th January, 1948. We have summarised, in very general terms, these provisions of the law which are sufficient for the purpose of considering the point that arises for consideration in this appeal.

The respondent is the proprietor of the Inam estate of Jinjeru—a whole inam village situated in Bandar Taluk of Krishna district in regard to which the rents were notified to be reduced by a publication in the Gazette on 14th March, 1949 and that notification was implemented; the rents were determined as stated therein and have been collected at those rates ever since.

While things were continuing in this State the Special Officer of the Board of Revenue, Andhra, issued a notice on 29th February, 1956 to *inter alia*, the respondent reading as under.

"As per the provisions contained in section 3 (1) of the Madras Estates Land (Rent Reduction) Act, 1947 it is proposed to reduce the rents with respect to the lands under occupation of the ryots the particulars of which are given below. Anybody having objection to these proposals may send in their objections reduced in writing before 20th March, 1956 or within 7 days after the receipt of this notice, otherwise any objection will not be entertained later."

Then followed details of the then existing rates of rent and the extent to which the rents were proposed to be reduced. Immediately thereafter the respondent moved the High Court of Andhra Pradesh under Article 226 of the Constitution for the issue of a writ of prohibition restraining the State authorities from proceeding with the enquiry in pursuance of the notice dated 29th February, 1956. The point that was raised in support of this prayer was that the Rent Reduction Act did not contemplate a second fixation of fair rent, and that when once the fair rent in respect of an "estate" had been fixed after following the procedure prescribed by section 2 of the Act there was no further power to modify or reduce the rates of rent so fixed. The answer of the appellant in the counter-affidavit filed before the Court was that there were some errors in the original fixation of rent and that the authorities were merely trying to rectify those errors which it contended was not prohibited by any provision of the Rent Reduction Act. There was also a plea raised on the strength of sections 13 and 15 of the Madras General Clauses Act which reads:

"13. Where an Act confers a power or imposes a duty then the power may be exercised and the duty shall be performed from time to time as occasion requires."

and

"15. Where an Act confers a power to make any rules or bye-laws, or to issue notification or orders, the power shall be construed as including a power exercisable in the like manner and subject to the like consent and conditions, if any, to rescind, revoke, amend or vary the rules, bye-laws notification or orders."

that the power to fix the fair and equitable rent was not exhausted by following the procedure under section 2 of the Act when the rents had been fixed, for the Jinjeru estate by the notification dated 14th March, 1949.

The petition came on for hearing, in the first instance, before a Division Bench of the Court which, having regard to the importance of the question involved, referred the matter for decision by a Bench of three Judges. The learned Judges held that the State Government had no power to reduce the rent fixed under the notification issued under section 3 of the Rent Reduction Act to the detriment of the landlord. The petition was accordingly allowed and the rule was made absolute, and a writ was directed to be issued as prayed for. The appellant thereafter applied to the Court for a certificate of fitness under Article 133 (1) (*c*) of the Constitution and this having been granted, the appeal is now before us.

The judgment of the High Court from which this appeal has been brought was delivered on 23rd February, 1960. A day previous to that, however, a statute enacted by the Andhra legislature—The Madras Estates Land (Reduction of Rent) (Andhra Pradesh Amendment) Act, 1960 (IX of 1960) received the assent of the President. By this enactment power is conferred upon the State Government to correct errors in notifications issued under section 3 (2) of the Act. The learned Solicitor-General who appeared for the appellant did not contest the correctness of the judgment of the High Court on the Rent Reduction Act, as it originally stood, but based his submissions to us entirely on the effect of the provisions contained in this Amending Act. The Amending Act is a very short enactment and consists of but 5 sections. The material provisions of the Act, relevant for our purposes are contained in its section 2 by which sections 3-A, 3-B and 3-C are added to the parent Act and in section 5 by which certain orders passed, notifications etc., issued under the parent Act before the commencement of the Amending Act are validated. The provision in relation to the correction of errors in orders made under section 3 (2) is contained in section 3-B and this was the provision which, it is submitted, justifies the action of the Government taken in 1956 and precludes it from being impeached. Section 3-B runs :

"3-B. *Correction of orders made under section* 3 (2)—(1) If the State Government are satisfied that in any order made by them under sub-section (2) of section 3, there is any error which does not vitiate the order but requires correction, they may, by order published in the Andhra Pradesh Gazette, correct such error, and the correction shall unless the State Government otherwise direct, be deemed to have taken effect from the commencement of the fasli year 1357.

(2) Where in consequence of a correction under sub-section (1), additional rent becomes recoverable in respect of any land under sub-section (4) of section 3, such rent shall be paid before the commencement of the fasli year immediately succeeding that in which the correction is published".

We are unable to accept this argument. In the first place, the section is prospective in the sense that it empowers the Government to take action of the sort contemplated by section 3-B after the Amending Act comes into force *i.e.*, after the 22nd February, 1960. In other words, if the provision in section 3-B is relied on, it merely enables the State Government to initiate proceedings for correcting errors. Indeed, this position was not disputed by learned Counsel for the respondent that Government can initiate action in the present case, hereafter to correct the rates of rent fixed by the notification under section 3 (2) issued on 14th March, 1949. In terms, therefore, it would not help the appellant to sustain the plea that the notice issued on 29th February, 1956 to the respondent to show cause why the rent of the inam estate should not be reduced should be deemed to be one which is either under or authorised by section 3-B introduced by the Amending Act.

The learned Solicitor-General, however, contended that section 3-B was concerned with the correction of errors in the rates fixed in section 3 (2) and that the provision would not preclude the utilisation of a notice issued prior to the coming into force of the Amending Act with that object from being treated as a basis for action being taken under section 3-B. Without pronouncing upon the correctness of this submission it is sufficient to point out that the terms of the notice of February, 1956, cannot be fitted into the type of notice contemplated by section 3-B. The latter would be a notice in which the reduction is sought to be made on account of some error in the earlier fixation. There is, however, no trace of any allegation of error in the notice of February, 1956 whose text we have set out earlier, though it was pointed out that when the matter came before the Court, the validity of this notice was sought to be sustained on the allegation that it was intended to initiate proceedings for correcting an error. What we are concerned with, in construing section 3-B is whether the notice issued before section 3-B became law could, in law, be treated as one issued with a view to action being taken under its provision. It is in that sense that we have observed that it cannot be fitted into the frame of the modification permitted by section 3-B. As we have pointed out earlier, there is nothing to preclude the Government from issuing a fresh notice and proceeding to determine the rent in accordance with the terms of section 3-B and the rest of the Rent Reduction Act.

Some faint attempt was made to suggest that the notice issued on 29th Februry, 1956, has itself been validated by section 5 of the Amending Act. That section reads:

"5. Any order made or notification issued cancelling or correcting an order made under sub-section (2) of section 3 of the principal Act, before the commencement of this Act which would have been valid if this Act had then been in force, shall be deemed to be valid for all purposes as if such order was made or such notification was issued in the exercise of the powers conferred by or under the principal Act as amended by this Act."

It is clear that on the terms of this validation provision the notices issued cannot be validated. No doubt, if reduction of rent had taken place on the ground that there was error in the original fixation, such a reduction would not have been open to challenge, for orders made or notifications issued cancelling or correcting an order are deemed to be valid as if the Act had been in force. It is obvious that the notice dated 29th February, 1956 cannot be brought within the description of the proceeding validated by section 5.

The appeal accordingly fails and is dismissed with costs.

V.K. ——— *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO AND N. RAJAGOPALA AYYANGAR, JJ.

Kamalammal and others .. *Appellants**

v.

Venkatalakshmi Ammal and another .. *Respondents.*

Hindu Law (as it stood prior to the passing of the Hindu Inheritance (Removal of Disabilities) Act (XII of 1928)—Inheritance—Rights of disqualified heir—Congenital deaf-mute becoming sole surviving member of joint family—If entitled to ancestral family properties.

Under the Hindu Law as it obtains in Southern India, though a member of a Hindu joint family who is congenitally a deaf-mute has no right to inheritance, the ancestral family properties vest in him as the sole surviving coparcener on the death of his father without other male issue.

This position is clear from Saraswati Vilasa which is an acknowledged authority in Southern India where a distinction is made between a "share-taker" and a "share-enjoyer". A disqualified heir, who is capable of contracting a marriage, obtains a right to a share in the family properties by birth though he is prevented from enjoying it while the affliction lasts. Thus he is a share-taker though not a share-enjoyer. There is nothing in the texts of the Smritis or of the Mitakshara which overrides this statement of the law in Saraswati Vilasa. That being so it would not be proper to discard it on the ground of alleged defects in its reasoning.

* C.A. No. 533 of 1961. 23rd September, 1964.

The basic postulate of the Mitakshara being that the right to property is by birth, unless a vestigal right in property is assumed to exist at birth even with a disqualification which disentitles the person from the right to active participation, his right to participation on the removal of the disability cannot logically be explained. If the distinction between share-taker and share-enjoyer be sound, it would convey no meaning if one were to hold that while though a disqualified person be a share-taker, he is still denied the right to the property when there is no other coparcener who could be a share-enjoyer.

The Hindu Law texts including the Smritis confer upon the disqualified heir a right to maintenance which is traceable to the right to property. That might indicate that it would not be violent inference to hold that the disqualified heir had still some interest however little it might be in the property, for surely it is the proprietary right that gives him the right to maintenance. If the right to be maintained is traceable to his right to the property in which he is excluded from participating in full, it would not be a violent inference to hold that he has an incipient and vestigal interest in that property which is not capaple of being asserted against other coparceners, but when there is none entitled to enjoy it as coparcener, blossoms into a full right.

Appeal by Special Leave from the Judgment and Decree dated the 19th May, 1959 of the Madras High Court in Second Appeal No. 376 of 1957.†

R. Gopalakrishnan, Advocate, for Appellants.

K. R. Chaudhuri and *K. Rajendra Chaudhuri*, Advocates, for Respondents.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—This appeal by Special Leave raises for consideration an interesting but, by no means, easy question of Hindu Law as regards the rights of a disqualified heir and in particular whether a disqualified heir who, in this case, was congenitally a deaf-mute becomes by birth a coparcener with his father, so that the ancestral family properties vest in him as sole surviving coparcener; on the death of his father without other male issue.

The facts of the case are not very material but are being set out merely to appreciate how the question arose. One Pappachari died in 1928 leaving behind him his widow—Sornammal, four daughters and a deaf-mute son Moogi Puttuswami. This son married Kamalammal who is the third defendant in the suit out of which the appeal arises. Puttuswami died in 1949 leaving behind him his widow Kamalammal and a minor daughter—Subbulakshmi, the fourth defendant in the suit. It is now common ground that the properties which are now in dispute between the widow of Pappachari who brought the suit and the wife and daughter of Puttuswami who contested their claim, were ancestral in the hands of Pappachari. Soon after the death of Pappachari his widow—Sornammal took possession of all the properties left by him and dealt with the suit property by first executing a lease in favour of one Ramakrishnachari (the second defendant). Later, Ramakrishnachari appears to have claimed that the document executed by Sornammal in his favour was in reality an usufructuary mortgage. This claim was acquiesced in by Sornammal and she offered to redeem the mortgage and required the second defendant to deliver possession of the property to her offering to pay the mortgage money claimed.

While this controversy was going on Puttuswami died, as stated earlier, in 1949 and thereafter his widow Kamalammal executed an usufructuary mortgage in favour of the second defendant of all the suit properties with a direction that he should discharge the earlier usufructuary mortgage. In this state of affairs Sornammal filed a suit—O.S. No. 248 of 1950 in the Court of the District Munsiff, Krishnagiri for a declaration of her title to the suit properties, contesting in this respect the right of Kamalammal and her minor daughter to the suit property and for possession of the property after redemption. Sornammal died pending the suit and her eldest daughter—Venkatalakshmi was impleaded as her legal representative. The mortgagees resisted the claim for redemption made by Sornammal by putting forward the mortgage executed in their favour by Kamalammal and thus the real issue between the parties was as to who had the title to the property, Sornammal as the widow of Pappachari or Kamalammal as the heir of Puttuswami, the latter on the foot of the entire property having survived to him on the death of Pappachari.

† A.I.R. 1960 Mad. 270.

The learned trial Judge decreed the suit of the plaintiff holding that, on the authorities which he discussed and the law which he considered, Puttuswami who was admittedly disqualified to inherit was in the same position as if he did not exist and that in consequence on the death of Pappachari, without male heirs the suit property was inherited by Sornammal—his widow as his sole heir and that on her death the same devolved on her daughters. The result of this line of reasoning was that neither Puttuswami nor his widow and daughter had any rights to the property and consequently the plaintiff was held entitled to possession of property after redemption of the usufructuary mortgage which she had executed. From this decision an appeal was taken by the mortgagees. The learned District Judge held that the question of law was concluded in favour of the appellants by the decision of a Full Bench of the Madras High Court to which we shall refer later and allowing the appeal, dismissed the suit. A Second Appeal was preferred to the High Court by Venkatalakshmi—daughter of Sornammal. The learned Single Judge who heard the appeal referred to the Hindu Law texts bearing on the point, made extracts from certain decisions and in effect refusing to follow the decision of the Full Bench of the Madras High Court, allowed the appeal and restored the decree for redemption passed by the trial Court, with the modification that the widow and daughter of Puttuswami were declared entitled to maintenance out of the properties and were granted a charge for the same. An application made to him under clause 15 of the Letters Patent for leave to appeal from his judgment was dismissed. This Court, however, on being moved by Kamalammal and her daughter as well as by the mortgagees granted Special Leave and that is how this appeal is now before us.

Shortly stated, the question raised for consideration is this. What are the rights of a disqualified heir under the Hindu law? It is common ground that a person who is born deaf and dumb is disqualified from inheriting and Puttuswami was one such. It is also clear law that though he himself cannot inherit, his lawful issue is entitled to do so. The question for decision in the appeal is whether the disqualification to inherit imposed by the texts of the Hindu Law necessarily involves the position that he has no rights at all in coparcenery property and particularly whether, even if he is excluded from claiming a partition of such property during the lifetime of the other coparceners, he is disentitled to take it as a sole surviving coparcener. The question thus propounded is ultimately dependent upon the proper construction of certain texts of the Hindu Law and on the interpretation which these texts have received at the hands of the Courts.

Broadly stated, under the texts of the Hindu law which we shall refer presently, as interpreted by the Courts, there are several bodily defects like impotence, blindness, idiocy, leprosy, insanity etc., which are stated to have the effect of disqualifying a person from inheritance. It is unnecessary to refer to these *in extenso,* but it is sufficient for our purpose to mention that among them one born deaf and dumb where the defect is incurable, is one such. However, by statute—the Hindu Inheritance (Removal of Disabilities) Act, 1928 (Central Act XII of 1928)—this was altered for its section 2 enacted :

"Notwithstanding any rule of Hindu Law or custom to the contrary, no person governed by the Hindu Law, other than a person who is and has been from birth a lunatic or idiot, shall be excluded from inheritance or from any right or share in joint family property by reason only of any disease, deformity, or physical or mental defect."

This Act received the assent of the Governor-General on 20th September, 1928 but its section 3 made the Act prospective and preserved rights which had accrued and liabilities which had been incurred before the commencement of the Act. Pappachari died in 1928 but before the Act came into force and hence the provisions of this enactment would not help the appellant and remove the disqualification, if any imposed upon the deaf and dumb Puttuswami. We are mentioning this in order to show that it is most unlikely that the point now arising for consideration would ever come before the Courts because of the operation of the statute which has been in force for over 35 years.

Before proceeding to consider the decisions bearing on the point, it would be useful to set out the principal texts on a construction of which the decisions proceed. Of the Smriti writers it is sufficient to refer to Vishnu :

" Outcastes, eunuchs, persons incurably diseased or deficient in organs of sense or action, such as blind, deaf, dumb, or insane persons or lepers, do not receive a share ; they should be maintained by those who take the inheritance and their legitimate sons receive a share—Chapter XV, sections 32-35."

We shall now set out the relevant passage in the Mitakshara, for there the text of Yajnavalkya Smriti which is commented on is also extracted. At the outset, we might point out that the portion dealing with exclusion from inheritance occurs in Chapter II, section 10 which deals with obstructed heritage or *Sapratibandha Daya* : The first placitum in this chapter reads :

" The author states an exception to what has been said by him respecting the succession of the son, the widow and other heirs, as well as the reunited parcener. "

Yajnavalkya is then quoted :

" An impotent person, etc................and others similarly disqualified must be maintained excluding them, however, from participation. But their blameless sons, whether legitimate or the offspring of a kinsman, are entitled to inherit. Their daughters should be maintained until they are provided with husbands. Their childless wives conducting themselves aright should be maintained until they are provided with husbands. "

In placitum 3 the commentator quotes the following from Manu :

" Impotent persons and outcasts are excluded from a share of the heritage ; and so are persons born blind and deaf as well as madmen, idiots, the dumb, and those who have lost a sense. "

and in placitum 5 he proceeds to say :

" Those persons are excluded from participation. They do not share the estate. They must be supported by an allowance of food and raiment only ; and the penalty of degradation is incurred, if they be not maintained. "

Placitum 6 reads :

" They are debarred of their shares, if their disqualification arose before the division of the property. But one already separated from his co-heirs, is not deprived of his allotment. "

and placitum 8 :

" The masculine gender is not here used restrictively in speaking of an outcast and the rest. It must be therefore understood, that the wife, the daughter, the mother, or any other female, being disqualified from any of the defects which have been specified, is likewise excluded from participation. "

In placitum 9 he concludes by stating :

" The disinherison of the persons above described seeming to imply disinherison of their sons, the author adds :

' But their sons, whether legitimate, or the offspring of the wife by a kinsman, are entitled to allotments, if free from similar defects.' "

Another Commentary usually regarded as authoritative in Dravida—the southern part of the Madras Presidency is Sarasvati Vilasa. Here the matter is dealt with in placita 148 to 159 but it is sufficient to extract a few of them :

Placitum 148 :

" Manu also, describes those who are ineligible for heritage :

' Impotent persons and outcasts do not take shares ; so also those who are born blind, and those who are born deaf, madmen, idiots, and the dumb, and those who are memberless. ' "

Placitum 149 :

" The meaning of this is :

' Impotent persons and outcasts do not take shares ; '

The two thus mentioned are to be nourished and cherished by their brothers who are eligible for the heritage, or by those who take the estate, or by those who take the women.

' Those who are born blind, and those who are born deaf ; ' the pair thus mentioned, though a share certainly belongs to them, are to be nourished and cherished, notwithstanding their being endowed with a share, because they are marriageable.

By the use of the word ' so ' , the inner meaning is, that deformed persons, if they are eligible for marriage, are share-takers, and are to be nourished and cherished.

' Madmen, idiots, and the dumb ; ' by being mentioned in a group, these also are to be nourished and cherished; but they are not share-takers. ' Even if they are eligible for marriage, ' is to be supplied. ' Whosoever are memberless ; ' this is inclusive of women also. Amongst memberless women, a fellow-

wife, a daughter, a sister, etc. are to be protected; and amongst men, a brother, his son, the paternal uncle, the maternal uncle etc."

Placitum 159 :

"Yajnavalkya says here :

'Let the impotent, the outcast, his son, the lame, the insane, the idiot, the blind, the incurably diseased, and the rest, be maintained; they are not share-takers'."

We shall reserve our comments on these texts till after we make reference to the leading decisions which have considered this or the related problems. We need only add that there is no text of any Smriti or of any Commentary on them which directly deals with the problem now before us.

The first of the leading cases which considered the texts in relation to exclusion from inheritance *in extenso* and explained their import was a decision of a Full Bench of five Judges of the Madras High Court in *Krishna* v. *Sami*[1]. This case is of considerable importance for two reasons. In the first place, all subsequent decisions rendered by the several High Courts have consistently treated it as properly interpreting the texts and thus the conclusions reached in it and the reasoning on which the same was based have moulded the law in this country for these about 80 years. The second circumstance which invests it with great weight is that Muttusami Ayyar, J., whose erudition in Sanskrit is well-known, was one of the members of the Bench, the judgment itself having been delivered by Sir Charles Turner, C.J. The exact point which was decided in *Krishna* v. *Sami*[1] is well brought out in the head-note which may be quoted in full :

"Under the Hindu law of inheritance which obtains in Southern India, the sons of a deaf and dumb member of an undivided Hindu family are entitled to a share of the family estate in the lifetime of their father, notwithstanding that they were born after the death of their grandfather.

In such a case the estate vests on the death of the grandfather in the qualified heirs subject to the contingency of its being divested on the recovery of the disqualified, or the birth of a qualified heir."

The point urged before the Court and which necessitated the elaborate examination of the texts and the determination of the basis on which the principles were rested was as regards the scope of the rule of Hindu law which affirmed that an estate once vested would not be divested by the emergence of a nearer heir. It was argued that on the application of this principle, the birth of a son to a disqualified son after the death of the grandfather did not affect the right of the other sons to their shares in the ancestral property which survived to them on the death of the grandfather. This was negatived and the learned Judges held that the son of the disqualified person was a coparcener in every sense who obtained a right by birth, and on whose birth the shares of the other coparceners would undergo a diminution. This conclusion they reached after an erudite and critical examination of the relevant texts including Yajnavalkya Smriti, the Mitakshara and the Sarasvati Vilasa. The learned Judges pointed out that though the Mitakshara denied the disqualified heir rights of participation—in the sense of the right to seek a partition, however confined even this disqualification to the "disqualified heirs" only and did not imply the disinherison of their legitimate sons or the offspring of the wife of a kinsman who were entitled to allotment, if free from defects. There are two matters to which it is necessary to advert in this decision. In the first place, speaking of the position of the disqualified heirs they pointed out :

"The Hindu law did not take thought only for those members of the family who were competent to discharge sacrificial functions, and while it saw the wisdom of restraining the disqualified from dealing with the family wealth, it secured to them maintenance during disqualification and a restoration to their rights when that disqualification ceased."

This would clearly indicate that the right to maintenance was related to their interest in the family property, for immediately the disqualification ceased, they became full-fledged members entitled to full participation and to demand partition. The other matter is that in support of their decision they quoted placitum 149 of Sarasvati Vilasa where the author says that even to the defective "a share belongs to them" and that is given as the reason for the injunction that "they are to be nourished and cherished". Besides, the learned Judges relied also on the

1. (1886) I.L.R. 9 Mad. 64 (F.B.)

last words of the same placitum where it is stated that the disqualified—in a joint family are "share-takers" though they do not, as stated by Vishnu "receive a share". We shall have occasion later to point out the importance of the reliance on these passages of Sarasvati Vilasa. *Krishna* v. *Sami*[1] thus established that a disqualified heir under the Hindu Law was capable of transmitting rights to joint family property to his issue so much so that on the birth of a son to a disqualified heir that son became a coparcener entitled to a share along with the other coparceners, and that in this respect it mattered little that the disqualified person was not a full-fledged coparcener. *Muthusami Gurukkal* v. *Meenammal*[2] was the next important case which also arose in Madras where a closely related question came up for consideration. One Gangadhara was entitled to an Archaka office. He was born sane but became insane after his son—Subbayya—attained majority. When the father was insane, Subbayya was performing the Archaka service. The son died in 1874 but Gangadhara continued to be insane till his death which was in 1880. Subbayya's widow died in 1911 and Gangadhara's widow died in 1912. The suit out of which the appeal before the High Court arose was brought by a reversioner of Subbayya against the daughter and daughter's son of Gangadhara. The defence to the suit was that Gangadhara was the last holder of the office and as such only his widow and daughter were entitled to the Archaka right. On the other hand, the contention urged on behalf of the plaintiff was that on Gangadhara's becoming insane Subbayya became entitled to the Archaka right and that as at the date of Subbayya's death in 1874, Gangadhara was insane, there could be no question of survivorship. The learned trial Judge as well as the first appellate Court dismissed the suit holding that as Gangadhara survived his son, he obtained a right to the office by survivorship and that on his death his widow and daughter became entitled to that right. The learned Judges concurred in this view, though the appeal itself was remanded for investigating the plea of an acquisition of title by prescription by Subbayya and his widow which had been raised by the plaintiff. This case, however, might not directly bear upon the point now under consideration because it would be seen that Gangadhara's disqualification was one which supervened and the decision proceeded on the theory that a supervening disqualification did not put an end to the right to a share which had inhered in him before the disqualification attached to him. In other words, Gangadhara had obtained a right by birth, though by reason of his subsequent insanity his right to active participation was kept in abeyance. When his son died the share which he was prevented from enjoying by reason of his disqualification, became his both in title as well as in enjoyment. Though this decision is capable of being distinguished from these cases of a congenital disqualification, because in them it might be said no right or scintilla of right arose on birth for even at that point of time there was the disqualification, it is still useful for establishing the position that a disqualified heir is not to be treated as if he did not exist at all. It might be pointed out that Seshagiri Ayyar, J., who spoke for the Court placed considerable reliance on the authority of Sarasvati Vilasa which he treated as a treatise which was of binding authority in Southern India.

So far as the effect of a supervening disqualification is concerned an identical conclusion has been reached by the other High Courts and among them it is sufficient to refer to *Moolchand* v. *Chahta Devi*[3], *Vithaldas Govindram* v. *Vadilal Chaganlal*[4] and *Musammat Dilraj Kuari* v. *Rikheswar Ram Dube*[5] and, in fact there is no decision which casts any doubt on the correctness of *Muthusami Gurukkal* v. *Meenammal*[2]. We would add that the decision was expressly approved by the Federal Court in *Kumari Ratneswari* v. *Bhagwati Saran Singh*[6].

The question of the correctness of *Krishna* v. *Sami*[1], was canvassed before the Full Bench of Madras High Court in *Amirthammal* v. *Vallimayil Ammal*[7]. Certain decisions of the Madras High Court appeared to proceed on a line of reasoning which ran counter to *Krishna* v. *Sami*[1], and therefore the matter was referred to a

1. (1886) I.L.R. 9 Mad. 64 (F.B.).
2. 38 M.L.J. 291 : (1918) I.L.R. 43 Mad. 464.
3. I.L.R. (1937) All. 825 (F.B.).
4. A.I.R. 1936 Bom. 191.
5. (1934) I.L.R. 13 Pat. 712.
6. (1950) S.C.J. 514 : 1949 F.C.R. 715.
7. (1942) 2 M.L.J. 292 : I.L.R. (1942) Mad. 807 : A.I.R. 1942 Mad. 693.

Full Bench. In *Amirthammal's case*,[1] the question for decision related to the validity of a will executed by one Veerakumara who died in 1912 by which he bequeathed all his property, which was ancestral, in favour of his widow who died in 1917. Veerakumara had a son—Chellakrishna who was a congenital idiot who survived him but he married Amirthammal—the appellant before the High Court and by her he had two sons and a daughter. Both these sons were born after the death of Veerakumara in 1912 but both of them had died by 1917. If Chellakrishna was, in law, a coparcener with his father, the latter could not validly bequeath the property held by him to his widow and those who claimed under the will had to be non-suited, and that indeed was the claim made by Chellakrishna's widow. The District Munsif who tried the suit held that the will was valid and the Subordinate Judge on appeal agreed with him and both of them found that Chellakrishna was a congenital idiot. The question which thus arose before the Court was whether Chellakrishna was a coparcener on the reasoning found in the judgment of the Court in *Krishna* v. *Sami*[2], and whether he was capable of transmitting heritable blood. Leach, C.J., who delivered the opinion of the Court founded himself wholly on the interpretation of the texts which was adopted in *Krishna* v. *Sami*[2], and stated that unless *Krishna* v. *Sami*[2] was overruled or could be treated as obsolete, the appellant was entitled to succeed. It is convenient, at this stage, to set out the reasoning upon which the learned Chief Justice based his judgment besides treating *Krishna* v. *Sami*[2] as a binding authority which had necessarily to be followed. He observed :

> "It is a fundamental rule of Hindu Law that a son born to a member of a joint family has on birth the right to share in the family estate. The fact that a son is born with an affliction which disqualifies him from enjoying his share does not rob him of his birthright. The affliction merely prevents his enjoyment of the right while the affliction lasts. The fact that the ancient texts recognise that his son, should one be born to him, has the right to share in the family estate is in itself an indication that he is a member of the coparcenary. In *Commissioner of Income-tax, Punjab* v. *Krishna Kishore*[3], the Privy Council expressly recognised that under Hindu law, where the estate is impartible and the holder is joint with his kinsmen, it is the undivided family and not the holder who is the owner of the estate. Only the senior member has the right of enjoyment of the properties forming the family estate, unless there be a custom giving the junior members a subsidiary right of maintenance out of them. I can see no difference in principle here and this provides an additional reason for reading the words 'excluding them from participation' used in the quotation from Yajnavalkya in placitum 1 of section X, Chapter II of the Mitakshara as meaning exclusion from enjoyment of the share while the affliction continues. The main reason is what is stated in the subsequent placita and in Sarasvati Vilasa."

Somayya, J., who concurred in this decision added his observations, basing himself on an independent examination of the texts. After referring to placitum 148 of Sarasvati Vilasa which the learned Judge referred to as a work of very high authority in Southern India, the learned Judge proceeded to set out the passage from Foulkes' translation, already extracted earlier. He further observed :

> "The word 'share-taker' is here obviously used in contrast with 'share-enjoyer' *i.e.* they are not share-enjoyers because they are excluded from participation. But as the commentator says, a share undoubtedly does exist."

After considering the grammar and the meaning of the Sanskrit words used, the learned Judge concluded :

> "According to this author (the author of Sarasvati Vilasa) therefore, if the persons who are disqualified are capable of contracting a marriage, they are undoubtedly sharers."

This brings us to the last of the decisions of the Madras High Court, this also being a decision of a Full Bench reported as *Kesava* v. *Govindan*[4]. As we have pointed out earlier, this decision, if correct, concludes the case in favour of the appellant. The head-note brings out the point decided in bold relief and it runs :

> "A member of a joint Hindu family who is disqualified from enjoying his share in the family estate by reason of the fact that he is deaf and dumb is entitled to take and enjoy the whole estate when he becomes the sole surviving member of the family."

One Muniyan who had been deaf and dumb from birth settled upon the plaintiff property which had formed the estate of the joint family of which he was a member.

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1. (1942) 2 M.L.J. 292 : I.L.R. (1942) Mad. 807 : A.I.R. 1942 Mad. 693.
2. (1886) I.L.R. 9 Mad. 64 (F.B.).
3. (1941) 2 M.L.J. 972: I.L.R. (1942) Lah. 1: L.R. 68 I.A. 155 (P.C.).
4. (1946) 1 M.L.J. 259: I.L.R. (1946) Mad. 452 (F.B.).

The joint family consisted of himself and his brother, Manickam, who died in or about the year 1919. On the death of Manickam the sons of Mari, a divided brother of the father of Muniyan and Manickam, took possession of the property as his heirs, Muniyan being excluded by reason of his affliction. The plaintiff sued them in the Court of the District Munsif for possession. The learned trial Judge held that Muniyan being disqualified, did not obtain any interest in the joint family property on the death of his brother Manickam and not having any title to property, could affect no settlement of it upon the plaintiff. From the dismissal of the suit the plaintiff appealed to the Subordinate Judge. The Subordinate Judge considered that the Full Bench decision of the High Court in *Amirthammal* v. *Vallimayil Ammal*[1], to which we have already referred, entitled Muniyan to claim the right to the property by survivorship and consequently decreed the plaintiffs' suit. On appeal to the High Court, the learned Single Judge held that *Amirthammal's case*[1] did not decide the precise point and consequently allowed the appeal, but on a certificate under clause 15 of the Letters Patent an appeal was filed and it was placed for decision before the Full Bench. Leach, C.J., who delivered the judgment of the Court referred to the earlier decisions and summed up the position thus :

> "If a disqualified person is a member of the coparcenary .... it would be unjust to hold that he is disqualified from enjoying the estate when he happens to be the sole surviving member of the family. There is no text which prevents him from so taking and to hold otherwise would mean that the whole estate would devolve on heirs outside the family, if there were any, and if not it would escheat to the Crown. It is one thing to say that an afflicted member shall not enjoy his share when there are other members of the joint family alive and quite another thing to say that he shall have no right in the estate when he happens to be the surviving member of the family. If he is not competent to manage the estate, the Court can appoint a guardian."

To complete the narrative of the decisions on this point we have to refer to the decision of the Federal Court in *Kumari Ratneswari* v. *Bhagwati Saran Singh*[2], to which we have already adverted. That case, as the one we have already referred in *Muthusami Gurukkal* v. *Meenammal*[3],—was concerned with a case of supervening insanity but what is of relevance in the present context is that not merely *Muthusami Gurukkal* v. *Meenammal*[3], but *Amirthammal* v. *Vallimayil Ammal*[1] were also approved.

Kania, C.J., said :

> "In *Amirthammal* v. *Vallimayil Ammal*[1], Full Bench of that Court (Madras High Court) after a review of the texts held that even a congenital idiot has the status of a coparcener under the Hindu law, notwithstanding that he is excluded from the enjoyment of his share."

Mahajan, J., expressed himself on this point thus :

> "Most of the High Courts in India on a consideration of the texts of Manu and Mitakshara relating to this matter have expressed the view that the right of a member of a Hindu joint family to share in ancestral property comes into existence at birth and is not lost but is only in abeyance by reason of any disqualification. It subsists all through, although it is incapable of enforcement at the time of partition, if the disqualification then exists. If on the death of all other members the disqualified member becomes the sole surviving member of the family, he takes the whole property by survivorship."

and proceeded to refer to the decisions in Madras and referred, with approval, to the decision of the Full Bench in *Amirthammal's case*[1]. Mukherjea, J., spoke to the same effect, though he reserved his opinion as to whether a congenital idiot could be held to be a coparcener under the Mitakshara law. He said :

> "In a recent Full Bench case (*Amirthammal* v. *Vallimayil*[1]), of the Madras High Court, the learned udges on a review of previous authorities have held that even a congenital idiot, who is capable of marrying and begetting children, has the status of a coparcener under the Mitakshara law, although he is excluded from the enjoyment of his share so long as his disability lasts. In support of this view, reliance was placed upon certain texts of Sarasvati Vilasa which is authoritative in the Southern Presidency and where a distinction has been made between disabled persons, who can marry and beget children and those who cannot. The class of persons coming under the first category are 'share-takers' and not 'share-enjoyers', while those coming under the second are not 'share-takers' at all."

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1. (1942) 2 M.L.J. 292 : I.L.R. (1942) Mad. 807 (F.B.).
2. (1950) S.C.J. 514 : 1949 F.C.R. 715.
3. I.L.R. (1918) 43 Mad. 464 : 38 M.L.J. 291.

It was not disputed by Mr. Choudhury—learned Counsel for the respondent that if the decision of the Full Bench of the Madras High Court in *Kesava* v. *Govindan*[1], was correct, the appeal must succeed, for there are no points of distinction on which the claim of the appellants could be defeated. The contention urged, however, was that that decision was wrong and that it proceeded on an incorrect appreciation of the texts of the Hindu law on the concept of coparcenary and the effect of the disqualification prescribed by the texts. In making this submission, Mr. Choudhury was merely restating what the learned Single Judge Ramaswamy, J., had stated in the judgment now under appeal. The learned Judge, after summarising the previous decisions of the Madras High Court observed, and that is the basis of his refusal to follow the Full Bench :

"In two Full Bench decisions the High Court of Madras has purported to extend the principle of these decisions—decisions which held that a qualified son of a disqualified heir is a coparcener with the other members of the family. In one case, it was held that a congenital idiot has in law the status of a coparcener and that he could successfully impeach a bequest made by his father as the sole surviving coparcener in favour of his widow. In the other case, the Full Bench decided that a congenitally deaf and dumb person is, in spite of his disqualification, entitled to take and enjoy the whole estate when he becomes the sole surviving member of the family ; *Amirthammal* v. *Vallimayil Ammal*[2]; and *Kesava* v. *Govindan*[1]. The correctness of these decisions is somewhat open to question."

This entire passage is but a reproduction of the comment in Mayne's Hindu Law, 11th Edition at page 721, though not so stated. The point made by the Editor of Mayne's Hindu Law in support of this last observation questioning the correctness of these decisions is rested on the position that if the disqualification is of a type which is congenital, as in the case of the deaf and the dumb he could never have had any right by birth, which is essential for his being treated as a member of the coparcenary and that if he was, by reason of the texts of the Hindu law, deprived, from the very moment of his birth, of his right to the property he could not obtain fresh rights by reason of the death of the other coparceners. Learned Counsel for the respondent strongly stressed this reasoning and in further support placed before us a very learned article in the Madras Law Journal contributed by an eminent Hindu Law lawyer (the late Mr. Venkatasubrahmanya Aiyer)—[(1942) 2 M.L.J.—Journal portion 63]—questioning the correctness of the decision of the Full Bench of the Madras High Court in *Amirthammal* v. *Vallimayil Ammal*[2], on this ground. In this connection learned Counsel desired us to treat the article as part of his argument.

Now, both in *Amirthammal's cases*[2] as well as in *Kesava* v. *Govindan*[1], reliance was placed by the learned Judges of the Madras High Court on placita 148 to 152 of Sarasvati Vilasa where a distinction is drawn between a share-enjoyer and a share-taker. The main grounds on which Mr. Venkatasubrahmanya Aiyar challenged the correctness of the decision in *Amirthammal's case*[2] in the article referred to, were:

(1) That the basis on which the disqualification rests is inconsistent with such afflicted person having any scintilla of interest in the joint family property. If he was right there, the death of the other coparceners, leaving him the sole member of the family could not improve his position.

(2) The distinction between share-takers and share-enjoyers which is adverted to in the Sarasvati Vilasa, is illogical and unsound and does not accord with the Smritis or the authoritative commentaries which expound the law.

(3) The Sarasvati Vilasa is a commentary of doubtful authority and cannot be utilised for laying down propositions or drawing inferences which are not supported by other ancient law books and in particular that there was not in the other Smritis or Commentaries any basis for attributing to the disqualified coparcener the status of a share-taker as distinguished from a share-enjoyer.

Taking up first the question as regards Sarasvati Vilasa being an authority which is of binding force in the Southern School *i.e.*, "that part of India south of the line

1. (1946) 1 M.L.J. 259 : I.L.R. (1946) Mad. 452 (F.B.).

2. (1942) 2 M.L.J. 292 : I.L.R. (1942) Mad. 897 (F.B.).

drawn from Ganjam and including the whole of the Dravida district and the territory under the Government of Fort St. George" it appears to us that the matter is no longer in doubt. Of the Commentaries which are authorities in that area undoubtedly the foremost is the Mitakshara of Vijnaneswara. That is followed by the Smriti Chandrika and next by the Sarasvati Vilasa. Sarasvati Vilasa is said to be the work of Pratapa Rudra Deva who was a King in Orissa and who reigned in the first quarter of the sixteenth century. It is, however, stated that it was difficult to ascertain whether it was written by the King himself or under his authority. It was referred to in *Jijyimba Bayi Saiba* v. *Kamakshi Bayi Saiba*[1], where the Madras High Court stated that this work was of an acknowledged authority in South India. In *Kattama Nachiar* v. *Dorasinga Tevar*[2], the learned Judges said it was similar to Smriti Chandrika and of some authority in Madras. It was, as already pointed out, referred to as a recognised authority laying down the law in *Krishna* v. *Sami*[3]. In *Appandai Vathiyar* v. *Bagubali Mudaliar*[4], White, C.J., and Krishnaswamy Iyer, J., after referring to the Mitakshara and the Smriti Chandrika observed :

> "Sarasvati Vilasa is also a recognised authority in Southern India which must be given effect to."

Similar observations are to be found in *Chinnaswamy Pillai* v. *Kunju Pillai*[5]. In Mayne's Hindu Law itself (page 48) it is stated :

> "The Sarasvati Vilasa is another work of authority in Southern India. It was written by Prataparudradeva, a King of Orissa. Dr. Jolly, Mr. Foulkes and Mr. Kane place the work in the beginning of the 16th century. It is referred to in several cases."

and more than one Privy Council decision is referred to as among the cases in which this book is referred to, though it is pointed out that it is not of greater authority than the Mitakshara. It is clear, therefore, that Sarasvati Vilasa cannot be discarded as not an authority for determining the rule of Hindu law in that part of India. The only questions then would be : (1) Did the learned Judges of the Madras High Court properly interpret the relevant placita 148 to 152 of Sarasvati Vilasa, (2) if the learned Judges have properly drawn the distinction between share-taker and share-enjoyer as deducible from the text, is the distinction drawn and the law thus understood contrary to any text of Mitakshara or other books of higher authority than the Sarasvati Vilasa?

Mr. Venkatasubrahmanya Aiyar has, in the article, devoted considerable attention to what he describes as the error committed by the author of the Sarasvati Vilasa in understanding the Smritis and the earlier Commentaries, and in particular on the reasoning employed in the placita we have extracted. We do not propose to examine this criticism for the reason that if Sarasvati Vilasa is an authority in South India, and this is evident from what we have stated earlier, and there is no text of the Mitakshara which directly contradicts the law as there expounded, it would not be proper to discard it on the ground of alleged defects in its reasoning.

We have already set out the relevant extracts from Sarasvati Vilasa where a clear distinction is drawn between enjoying a share and taking a share. We would add that such a distinction would square logically with the accepted position that even if at birth there is an affliction which disqualifies, still if the defect is later remedied, he becomes entitled to claim a share. The basic postulate of the Mitakshara being that the right to property is by birth, unless a vestigal right in property is assumed to exist at birth even with a disqualification which disentitles the person from the right to active participation, his right to participation on the removal of the disability cannot be logically explained. If the distinction between share-taker and share-enjoyer be sound, it would convey no meaning if one were to hold that while though the disqualified person be a share-taker, he is still denied the right to the property when there is no other coparcener who could be a share-enjoyer.

The next line of approach is whether there is anything in the text of the Smritis or of the Mitakshara which overrides the statement of the law in Sarasvati Vilasa

1. (1868) 3 M.H.C.R. 424 (452).
2. (1871) 6 M.H.C.R. 310 at 333.
3. (1886) I.L.R. 9 Mad. 64 (F.B.).
4. (1910) 20 M.L.J. 275 : I.L.R. 33 Mad. 432.
5. (1911) 21 M.L.J. 856 : I.L.R. 35 Mad. 159.

and forbids effect being given to the law as there enunciated. What is relied on in this connection is not so much any text but the principle underlying the theory of coparcenary. It is said that a coparcenary interest arises on birth and if a disqualification attaches not after the right by birth has been obtained but even at the moment of birth preventing, as it were, the right by birth emerging how can the right of survivorship which is dependent on the existence of a right by birth come into being on the death of the other coparceners? As pointed out earlier, it is this that forms, as it were, the core of the argument against the correctness of the Full Bench decision in *Kesava* v. *Govindan*[1] to be found in Mayne's Hindu Law. There is no doubt that this is a powerful argument and if the law had to be determined only on the basis of logic the argument would have got force, subject to what we have pointed out earlier as flowing from the accepted position that on the defect ceasing the right is enforceable. But Hindu Law has not always been logical. Thus we have the instance in the law relating to impartible estates, of the property being treated as coparcenary property in which the other members of the so-called coparcenary have no right to interdict alienations. It might be said that this was the result of the decisions of the Privy Council in *Sartaj Kuari* v. *Deorajkuari*[2], and *Venkata Surya* v. *Court of Wards*[3] but that might not wholly suffice to brush them aside. In the next place, the texts including the Smritis—Manu, Narada, Vishnu as well as Mitakshara expressly confer upon the disqualified heir a right to maintenance and brand it as a sin to deny him maintenance during his entire life. That might indicate that it would not be violent inference to hold that the disqualified heir had still some interest however little it might be in the property, for surely it is the proprietary right that gives him the right to maintenance. It might be noticed that under the Hindu law the liability to maintain others arises in a two-fold manner: (*a*) from the existence of a particular relationship independent of the possession of any property, (*b*) on possession of property. In the first category fall the cases of the liability to maintain a person's wife, minor sons, and unmarried daughters and aged parents. Here the obligation is personal and is brought into existence by the relationship. In the other category are those where the liability is dependent on the possession of coparcenary property. Assuredly the liability to provide for the maintenance of the disqualified heir under the Hindu law would fall under the latter category also *i.e.*, it is not confined to the particular relationships which cast the obligation to maintain. Thus a brother would have to be maintained out of the joint property where he is disqualified from claiming partition. No doubt, the texts deny him the right to partition but that is not the subject-matter of the discussion here. If the right to be maintained is traceable to his right to the property in whch he is excluded from participating in full, it would not be a violent inference to hold that he has an incipient and vestigal interest in that property which is not capable of being asserted against other coparceners, but when there is none entitled to enjoy it as coparcener, blossoms into a full right. Next, we have the circumstance that the qualified male issue of a disqualified person is a coparcener and is entitled to take the property by survivorship. The theory therefore cannot be that a disqualified heir should be treated as if he did not exist at all.

These considerations on the merits apart, there are two other factors to which we are bound to refer. The first is that this decision of the Madras High Court has not been doubted or dissented from in any Court in India these 50 years and more and has determined the rights of parties at least in Madras during this period. Besides, as we have already pointed out, the distinction between share-taker and share-enjoyer which forms one of the lines of reasoning on which the decision in *Amirthammal's case*[4] rests, was approved by several Judges of the Federal Court in *Kumari Ratneswari* v. *Bhagwati Saran Singh*[5], though the case then before the Court was one of a disqualification arising after the vesting of the property and can, therefore, be

1. (1946) 1 M.L.J. 259 : I.L.R. 1946 Mad. 452 (F.B.).
2. (1888) L.R. 15 I.A. 51 : I.L.R. 10 All 272.
39 M.L.J. (Supp.) 1 : L.R. 26 I.A. 83 : I.L.R. 22 Mad. 383.
4. (1942) 2 M.L.J. 292 : I.L.R. (1942) Mad. 807 (F.B.).
5. (1950) S.C.J. 514 ; 1949 F.C.R. 715.

distinguished on that ground. Lastly, the law as to disqualified heirs has now been amended and made statutory by the Hindu Inheritance (Removal of Disabilities) Act, 1928 and the precise rule of Hindu law apart from statute is no longer of any practical significance. In these circumstances, we consider that we cannot accede to the submission of the respondent and upset the law as laid down in *Kesava* v. *Govindan*[1].

Before concluding it is necessary to advert to one feature which would be apparent even from our narrative. There was a decision of the Full Bench which interpreted the texts and laid down the law on the topic and it is somewhat surprising that the learned Single Judge of the Court thought it proper to refuse to be bound by that judgment and proceeded on his own line of reasoning based on authorities several of which were discussed by the Full Bench relying merely on the statement by the Editor of Mayne's Hindu Law that the decision required reconsideration. We cannot but deprecate this practice as it destroys the certainty of the law which the theory of judicial precedent seeks to establish. Not merely convention but rules framed by several High Courts require that where a learned Single Judge or a Division Bench does not agree with a Full Bench decision he or they either make a Reference to the Full Bench or place the papers before the Chief Justice for such a Reference being made. But that was not, however, what the learned Single Judge did in the present case. He took the unusual step of practically overruling the Full Bench and refusing to be bound by it. In addition he refused leave to appeal under clause 15 of the Letters Patent, with the result that the appellant was forced to move this Court for Special Leave.

The appeal is accordingly allowed and the judgment of the High Court reversed and the decree of the Subordinate Judge, Salem, restored with costs here and in the High Court.

V.K. *Appeal allowed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH AND J. R. MUDHOLKAR, JJ.

Laxmi Devi ... *Appellant* *

v.

Mukand Kanwar and others ... *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 21, *rules* 66 *and* 90—*Auction sale of immovable property in execution of a decree—Proclamation of sale not mentioning existence of a charge on the property sold—Charge-holder if suffers substantial injury by reason of such irregularity—If and when can successfully impeach sale under Order* 21, *rule* 90.

Transfer of Property Act (*IV of* 1882) (*as amended by Act XX of* 1929), *sections* 2 (*d*), 5 *and* 100—*Scope of section* 100—*If applies to transfers by operation of law.*

Before an application to set aside a sale effected in execution of a decree under Order 21, rule 90 of the Civil Procedure Code can succeed, the applicant has to show that the impugned sale was vitiated by a material irregularity or fraud in publishing or conducting it and as required by the proviso to that rule it is also necessary that he should show that in consequence of the said irregularity or fraud he had sustained substantial injury. Therefore an application under Order 21, rule 90, ought to contain an allegation as to substantial injury. But where substantial injury is alleged to be implicit in the mateial irregularity set out in the application, it would be too technical to hold that the application should be dismissed on the preliminary ground that no specific or express averment has been made as to substantial injury suffered by the applicant.

By virtue of the saving clause contained in section 2 (*d*) of the Transfer of Property Act (IV of 1882), section 100 of that Act would apply also to transfers by operation of law. This is so inspite of the fact that section 5 of the Transfer of Property Act which defines " transfer of property " appears to exclude transfers by operation of law from the purview of section 100 of the Transfer of Property Act. The positive provision contained in section 2 (*d*) must prevail over the definition of " transfer of property" prescribed by section 5. Such a positive provision as section 2 (*d*) cannot be made to yield to what may appear to be the effect of the definition prescribed by section 5 and so notwithstanding the defini-

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1. (1946) 1 M.L.J. 259 : I.L.R. (1946) Mad. 452 (F.B.)

*C.A. No. 247 of 1962. 9th October 1964.

tion prescribed by section 5, the latter part of section 100 of the Transfer of Property Act must be deemed to include auction sales effected in execution of a decree.

Arumilli Surayya v. *Pinisetti Venkatara manamma and others*, (1940) 1 M.L.J. 831 and *Crest* v. *Ganga Ram Gool Baj*, I.L.R. (1937) 1 Cal. 203, Overruled.

Where, therefore, certain immovable property is sold in execution of a decree without any reference in the proclamation of sale issued under Order 21, rule 66 of the Civil Procedure Code preceding the sale to the existence of a charge on the property sought to be sold, the charge-holder will not be able to enforce the charge against the property in the hands of the auction purchaser by reason of section 100 of the Transfer of Property Act. The charge-holder will be a person affected by the sale and therefore it would be competent for him to file an application under Order 21, rule 90 to set aside the sale. But it cannot be assumed as a matter of law that in every case where a charge has become unenforceable against an auction-purchaser by reason of the fact that it was not shown in the proclamation preceding the auction sale, it follows that the charge-holder has suffered substantial injury. Whether or not the injury suffered by the charge-holder is substantial, would be a question of fact and must depend upon several relevant facts. How many properties have been sold at the auction sale; how many out of them were the subject-matter of the charge; what is the extent of the claim which the charge-holder can legitimately expect to enforce against the properties charged, these and other relevant matters must be considered before deciding whether or not the injury suffered by the charge-holder is substantial, and whether the sale should be set aside.

Appeal from the Judgment and Order, dated 29th July, 1960 of the Rajasthan High Court in D.B. Civil Misc. Appeal No. 54 of 1957.

Bishan Narain, Senior Advocate, (*Amar Chand Inani* and *B. P. Maheshwari*, Advocates, with him), for Appellant.

B. D. Sharma, Advocate, for Respondent No. 1.

The Judgment of the Court was delivered by

Gajendragadkar, C. J.—This appeal arises out of an application made by respondent No. 1, Smt. Mukand Kanwar, challenging the validity of an auction sale held on the 14th May, 1954 in execution of a money decree passed in favour of Ratan Lal Dani, Secretary, Hindu Charitable Aushodhalya, Ajmer, respondent No. 2, and against Umrao Mal, respondent No. 3. The property sold at the auction sale is "old Daikhana" at Ajmer. On the 24th June, 1950, Umrao Mal who was the owner of the property, mortgaged it to the appellant Laxmi Devi. Later, respondent No. 2 obtained a money decree against respondent No. 3 for a large amount and in execution of this money decree he brought the property in question to sale. Auction sale was accordingly held on the 14th May, 1954, and the appellant purchased the property subject to the pre-existing mortgage in her favour. The amount due under the mortgage was Rs. 33,264 and as auction-purchaser, the appellant paid Rs. 2,800 whereby she purchased the equity of redemption vesting in respondent No. 3, the judgment-debtor. It is the validity of this sale that is challenged in the present proceedings.

Long before the mortgage was executed, respondent No. 3 had executed in favour of his mother, respondent No. 1, a document whereby her maintenance was guaranteed. This document had created charge over certain properties belonging to respondent No. 3. On the strength of this document, respondent No. 1 sued respondent No. 3 (Civil Suit No. 233 of 1952). In this suit, she claimed arrears of maintenance and asked for a declaration that the properties specified in the plaint, which were the same as the properties covered by the previous agreement between the parties, were subject to a charge for her maintenance. The trial Court gave her a decree for arrears of maintenance, but declined to make the declaration as to charge claimed by her. This decree was pronounced on the 31st July, 1952. Against this decree, respondent No. 1 preferred an appeal (No. 80 of 1952) to the Judicial Commissioner, Ajmer. Her appeal succeeded and the charge over the properties was declared in her favour. This decision was pronounced on the 10th February, 1954.

After the auction sale was held on the 14th May, 1954, it was challenged by two separate applications, onewas made by respondent No. 3, the judgment-debtor, on the 28th June, 1954, and the other by respondent No. 1 on the same date. Both these applications were made under Order, 21, rule 90 of the Code of Civil Procedure. The application made by respondent No. 3 was dismissed on the 30th

April, 1955, while the application made by respondent No. 1 went to a trial. The Executing Court which heard this application tried three issues. The first issue was whether the sale had been vitiated by any irregularity as required by Order 21, rule 90. The second was whether respondent No. 1 was a person whose interests had been affected by the impugned sale ; and the third was whether the irregularity alleged by respondent No. 1 had caused substantial loss to her. All these issues were decided in favour of respondent No. 1. In the result, the impugned sale was set aside on the 4th May, 1955.

The appellant challenged the correctness of this decision before the Judicial Commissioner, Ajmer. It was urged on behalf of the appellant that the application made by respondent No. 1 did not satisfy the requirements of Order 21, rule 90 of the Code inasmuch as appropriate allegations had not been made in the application showing that substantial injury had been suffered by respondent No. 1 by reason of the irregularities which, according to her, had vitiated the said sale. This plea was rejected by the Judicial Commissioner. It was then urged that respondent No. 1 was not competent to make the said application. The Judicial Commissioner did not accept even this plea. The last argument which was pressed before the Judicial Commissioner was that the finding recorded by the Executing Court that respondent No. 1 had suffered substantial injury was not justified, and that in fact, the appellant had no opportunity to lead her evidence on that issue, because all the three issues on which the Executing Court had made its findings had been framed by it at a very late stage of the proceedings. This plea was upheld by the Judicial Commissioner, and so, he set aside the finding of the Executing Court on that issue and sent the case back for disposal in accordance with law, with a direction that the issue as to substantial injury should be tried afresh. This order was pronounced on the 26th August, 1955.

After remand, the Executing Court considered the issue as to substantial injury and held that respondent No. 1 had failed to show any substantial injury. As a result of this finding, it ordered that her application under Order 21, rule 90 should be dismissed, and the sale should be confirmed. This order was pronounced on the 27th April, 1957.

Aggrieved by this order, respondent No. 1 preferred an appeal, and since the High Court of Judicature at Rajasthan had then come into existence, her appeal was heard by the said High Court. The High Court has held that the Executing Court was in error in coming to the conclusion that respondent No. 1 had not proved substantial injury. The contentions raised by the appellant in support of the ultimate decision reached by the Executing Court were rejected by the High Court, and as a result, the application made by respondent No. 1 was allowed and the impugned sale set aside. This appellate order was pronounced on the 29th July, 1960. It is against this order that the appellant has come to this Court with a certificate granted by the said High Court. Thus, it will be noticed that the sale which took place on the 14th May, 1954, still remains to be confirmed.

On behalf of the appellant, Mr. Bishan Narain has conceded that as a person holding a charge over the property sold at the auction sale, respondent No. 1 can rely on section 100 of the Transfer of Property Act and as such was competent to make the application under Order, 21 rule 90. Order 21, rule 90 (1) provides, *inter alia*, that where any immovable property has been sold in execution of a decree, any person whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it. There is a proviso to this rule which is relevant for our purpose. This proviso lays down that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud. While conceding that respondent No. 1 was entitled to make an application as a person whose interests were affected by the impugned sale, Mr. Bishan Narain argues that if the application made by her is properly construed, it would appear that the material allegations of fact which must be made by the applicant invoking Order 21, rule 90 (1),

have not been made; and so, the said application should be dismissed on that ground alone. On the merits, he contends that there is no evidence on which a finding can be made in favour of respondent No. 1 that she has suffered substantial injury by reason of any irregularity committed in the conduct of the sale.

The application made by respondent No. 1 is no doubt somewhat defective, because it does not, in terms, allege that as a result of the irregularity alleged in the application, respondent No. 1 has suffered substantial injury. The application avers that before the impugned auction sale was held, a proclamation had been issued, but the said proclamation did not refer to the charge in favour of respondent No. 1 which had already been recognised by decree in a suit between respondent No. 1 and respondent No. 3; and that naturally attracts the provisions of Order 21, rule 66 of the Code. Order 21, rule 66 (2) (*c*) requires that the proclamation shall be drawn up and shall specify as fairly and accurately as possible any incumbrance to which the property sought to be sold is liable. The failure to mention the charge in favour of respondent No. 1 would, therefore, constitute an irregularity within the meaning of Order 21, rule 90 (1). This position is also not in dispute.

The contention, however, is that the application made by respondent No. 1 does not show what injury she has suffered as a result of the said irregularity, and that, it is argued, constitutes a serious infirmity in the application which would entail its dismissal. On the other hand, Mr. Sharma for respondent No. 1 has relied on the fact that the auction sale would virtually wipe out or extinguish the rights which have accrued to respondent No. 1 by virtue of the charge declared by a decree in her favour, and he has suggested that the legal consequence flowing from the fact that the auction sale has been held without notice of the charge in favour of respondent No. 1 itself constitutes substantial injury to the interests of respondent No. 1. This argument is based on the latter part of section 100 of the Transfer of Property Act. We will presently refer to this provision. At this stage, it is enough to state that if Mr. Sharma is right in contending that an auction sale of immovable property which has followed the proclamation issued under Order 21, rule 66 in which no reference to a charge is made, materially affects the rights of the charge-holder, some injury would automatically flow from the irregularity alleged in the application filed by respondent No. 1, and so, it would not be appropriate to hold that the said application should be dismissed on the ground that no substantial injury has been alleged as required by the proviso to Order 21, rule 90 (1).

It is true that before an application made under Order 21, rule 90 can succeed, the applicant has to show that the impugned sale was vitiated by a material irregularity or fraud in publishing or conducting it; and as required by the proviso, it is also necessary that he should show that in consequence of the said irregularity or fraud, he had sustained substantial injury. Therefore, Mr. Bishan Narain is right when he contends that the application made by respondent No. 1 ought to contain an allegation in regard to the material irregularity as well as an allegation as to substantial injury. But, in our opinion, in a case like the present, where substantial injury is alleged to be implicit in the material irregularity set out in the application, it would be too technical to hold that the application should be dismissed on the preliminary ground that no specific or express averment has been made as to substantial injury suffered by respondent No. 1.

Now, in dealing with the question as to whether respondent No. 1 can be said to have alleged that she has suffered substantial injury by reason of the fact that she has alleged a material irregularity which in law, necessarily leads to substantial injury, it is necessary to consider the question as to whether the latter part of section 100 of the Transfer of Property Act applies to the present case. Section 100 deals with charges, and it provides when a person can be said to have a charge on the property; and adds that all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge. It is common ground that respondent No. 1 can claim to be charge-holder as defined by section 100.

That takes us to the latter part of section 100. This part provides, *inter alia*, that save as otherwise expressly provided by any law for the time being in force no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge. Mr. Sharma contends that the auction-purchaser holds the property as a result of the auction sale, and in that sense, the property must be held to have been transferred to him. He adds that the charge was not notified in the proclamation, and so, the auction-purchaser has no notice of the charge, and the sale is undoubtedly supported by consideration. In other words, the case of the appellant directly falls under this part of section 100, and so, respondent No. 1 would not be able to enforce her charge against the property purchased by the appellant at the auction sale. That, according to him, constitutes substantial injury.

This argument raises the question as to whether the relevant provision of section 100 takes in the cases of auction purchase at all. For answering this question, it is necessary to refer to two other provisions of the Transfer of Property Act. Section 2 (*d*) provides that nothing herein contained shall be deemed to affect, save as provided by section 57 and Chapter IV of this Act, any transfer by operation of law or by, or in execution of a decree or order of a Court of competent jurisdiction. The effect of this provision is that the provisions of the Transfer of Property Act will not apply to any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction. This provision is clear and emphatic. It says that nothing in the Transfer of Property Act will apply to the transfers just indicated; and that would naturally take in the whole of section 100. But there is an exception made to this provision by section 2 (*d*) itself by the saving clause, and this exception covers cases provided by section 57 and Chapter IV. Chapter IV deals with mortgages of immovable property and charges, and includes sections 58 to 104. Section 100, therefore, falls within Chapter IV; and the result of the saving clause is that section 100 would apply to transfers by operation of law. There is, therefore, no doubt that if the question as to the applicability of the latter part of section 100 to cases of auction sales had to be determined only by reference to section 2 (*d*), the answer would clearly be in favour of such applicability.

It is true that when section 2 (*d*) was originally enacted, the latter part of section 100 was not included in the Transfer of Property Act; this was added in 1929 by section 50 of Act XX of 1929. That, however, would make no difference to the interpretation of the relevant clause in section 2 (*d*). The fact that the saving clause included in section 2 (*d*) as it was originally enacted, could not have taken in the latter part of section 100, makes no difference to its construction, because as soon as the latter provision was added to section 100, it became a part of the provisions contained in Chapter IV and automatically fell within the terms of the saving clause. If the Legislature had intended that the provision added to section 100 in 1929 should not fall within the saving clause, an appropriate provision would have been made by amending section 2 (*d*) in that behalf. Therefore, section 2 (*d*) by itself clearly supports Mr. Sharma's contention that the appellant who is an auction-purchaser would be able to claim immunity against the enforcement of the charge in favour of respondent No. 1 by virtue of the provisions contained in the latter part of section 100.

This position, however, has become somewhat complicated by reason of the provisions contained in section 5 of the Transfer of Property Act. Section 5 provides, *inter alia*, that in the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons. In other words, in terms, the definition of the expression "transfer of property" as used in all the sections of the Transfer of Property Act is intended to take in transfers effected by acts of parties *inter vivos*, and an auction-sale clearly is not such an act. Section 5 would, therefore, appear to exclude auction sales from the purview of section 100 altogether. This result would appear to be consistent with the provision in the Preamble of the Act which says that the

Transfer of Property Act was enacted because it was thought expedient to define and amend certain parts of the law relating to the transfer of property by act of parties. That is the position which emerges from the reading of section 5 coupled with the Preamble ; and that naturally raises the question as to how to reconcile these two inconsistent positions.

In our opinion, the positive provision contained in section 2 (*d*) must prevail over the definition of " transfer of property " prescribed by section 5. No doubt, the purpose of the definition is to indicate the class of transfers to which the provisions of the Transfer of Property Act are intended to be applied ; but a definition of this kind cannot over-ride the clear and positive direction contained in the specific words used by section 2 (*d*). As we have already seen, the result of the saving clause, enacted by section 2 (*d*) is to emphasise the fact that the provisions of section 57 and those contained in Chapter IV must apply to transfer by operation of law. Such a positive provision cannot be made to yield to what may appear to be the effect of the definition prescribed by section 5 ; and so, we are inclined to hold that notwithstanding the definition prescribed by section 5, the latter part of section 100 must be deemed to include auction sales.

This question has been considered by our High Courts on several occasions, and, on the whole, the majority view appears to be in favour of the conclusion which we have just indicated. In *Nawal Kishore* v. *The Municipal Board, Agra*[1] this question was referred to a Full Bench of the Allahabad High Court, because there appeared to be a conflict between two previous decision of Division Benches of the said High Court on this point. These two decisions were *Rai Indra Narain* v. *Muhammad Ismail*,[2] and *Municipal Board, Cawnpore* v. *Roop Chand Jain*[3], In the first decision, the Allahabad High Court had taken the view that auction sales do not fall within the purview of the latter part of section 100, while in the latter case, a contrary view had been accepted. The Full Bench preferred the latter view to the former. Since this Full Bench decision was pronounced in the Allahabad High Court, auction-purchasers have been consistently held to fall under the latter part of section 100. It has been held by the Full Bench that when the relevant clause in the latter part of section 100 speaks of any property in the hands of person to whom such property has been transferred, the concept of transfer is wide enough to include transfers effected by acts of parties as well as transfers effected by operation of law. The same view has been accepted by the Patna High Court in *R. L. Nandkeolvar* v. *Sultan Jehan*[4] and by the Punjab High Court in *Manna Singh Allah Singh* v. *Wasti Ram Saraf and others*[5]. The decision of the Madras High Court in *Arumilli Surayya* v. *Pinisetti Venkataramanamma and others*[6], and the decision of the Calcutta High Court in *Crest* v. *Ganga Ram Gool Baj*[7], which appear to support the contrary view do not, in our opinion, correctly represent the true legal position in this matter. Therefore, we must deal with the present appeal on the basis that as a result of the failure of the proclamation to refer to the charge in favour of respondent No. 1, she would not be able to enforce her charge against the property purchased by the appellant by auction-sale ; and that means that the impugned sale has been conducted in a materially irregular manner and as a consequence of the said irregularity, some injury has resulted to respondent No. 1.

That raises the question as to whether the said injury can be said to amount to substantial injury within the meaning of proviso to Order 21, rule 90 (1) ; and this inevitably would be a question of fact. The High Court appears to have held that as soon as it is shown that the charge would become unenforceable against the appellant auction-purchaser by virtue of the provisions of section 100, it follows as a matter of law that respondent No. 1 has suffered substantial injury, and so, the impugned sale must be set aside. We are not prepared to accept this view. We do

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1. I.L.R. 1943 All. 453.
2. I.L.R. 1939 All. 885.
3. I.L.R. 1940 All. 669.
4. I.L.R. 31 Pat. 722.
5. A.I.R. 1960 Pun. 296.
6. (1940) 1 M.L.J. 831 : A.I.R. 1940 Mad. 701.
7. I.L.R. (1937) 1 Cal. 203 : A.I.R. 1937 Cal. 129.

not think it can be reasonably assumed as a matter of law that in every case where a charge has become unenforceable against an auction-purchaser by reason of the fact that it was not shown in the proclamation preceding the auction sale, it follows that the charge-holder has suffered substantial injury. Whether or not the injury suffered by the charge-holder is substantial, must depend upon several relevant facts. How many properties have been sold at the auction sale ; how many out of them were the subject-matter of the charge ; what is the extent of the claim which the charge-holder can legitimately expect to enforce against the properties charged, these and other relevant matters must be considered before deciding whether or not the injury suffered by the charge-holder is substantial. It is from this point of view that the material facts in the present case must now be considered.

Properties which are the subject-matter of the charge are five in number. Out of these properties, it is property No. 3 alone which has been sold at auction sale. It appears that properties Nos. 1 and 2 had already ceased to be available to the charge-holder, and so, the consideration of the question as to whether the injury suffered by respondent No. 1 is substantial, must depend upon the relative values of properties Nos. 4 and 6. This question has been considered by the Executing Court when the matter was sent back to that Court by the Judicial Commissioner and the Executing Court has made a definite finding that the injury suffered by respondent No. 1 cannot be said to be substantial. According to it, properties Nos. 4 and 6 which would be available to respondent No. 1 would be enough to meet all her legitimate claims against the judgment-debtor, respondent No. 3. The value of property No. 4 is Rs. 1,18,967, whereas the value of property No. 6 is Rs. 1,25,464. The Executing Court has taken into account the amount which respondent No. 1 is entitled to claim by way of maintenance from respondent No. 3, has also borne in mind the fact that respondent No. 1 is an old lady past 70 years of age, and has come to the conclusion that, on the whole, the sale of property No. 3 to the auction-purchaser cannot be said to have caused substantial injury to her. In our opinion, it is difficult to differ from this conclusion ; and so, it follows that though respondent No. 1 has been able to show that her charge could not be enforced against the appellant, it is not shown that this circumstance has caused substantial injury to her. The result, therefore, is that the requirement of the proviso to Order 21, rule 90 of the Code is not satisfied in the present case.

We ought to add that pending the appeal before this Court, respondent No. 3 Umrao Mal has died leaving behind him his mother, respondent No. 1 and his widow, and the estate of Umrao Mal has devolved on these two widows ; and so, respondent No. 1 has now become the owner of part of the properties against which she would otherwise have been entitled to proceed in execution of her maintenance decree.

The result is, the appeal is allowed, the order passed by the High Court is set aside and the application made by respondent No. 1 under Order 21, rule 90 is dismissed. There would be no order as to costs throughout.

V.K. *Appeal allowed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH, RAGHUBAR DAYAL AND J. R. MUDHOLKAR, JJ.

The State of Madras .. *Appellant**

v.

G. Sundaram .. *Respondent.*

Constitution of India (1950), *Article* 226—*Findings of Disciplinary Tribunal in departmental enquiry against public servant—Propriety and correctness of—If can be examined in writ petition.*

Madras District Police Act (*Central Act XXIV of* 1859), *section* 10—*Madras Police Subordinate Service* (*Discipline and Appeal*) *Rules* (1950), *Rules* 2 (*g*), 4 *and* 5 (*c*)—*Compulsory retirement of Inspector of Police for misconduct—Competency of State Government to order—Enquiry under Madras Civil Services* (*Disciplinary Proceedings Tribunal*) *Rules instead of under Madras Police Subordinate Service* (*Discipline and Appeal*) *Rules when both are applicable—Validity.*

It is now well settled that a High Court in the exercise of its jurisdiction under Article 226 of the Constitution of India cannot sit in appeal over the findings of fact recorded by a competent Tribunal in a properly conducted departmental enquiry against a public servant except when it be shown that the impugned findings were not supported by any evidence. Where, therefore, the State Government compulsorily retires a Police Officer on the basis of findings recorded by a Tribunal in an enquiry under the Madras Civil Services (Disciplinary Proceedings Tribunal) Rules, 1948 the High Court in a writ-petition against that order will not be competent to consider the question whether the evidence before the Tribunal was insufficient or unreliable to establish the charge against the Police Officer. It can consider only the fact whether there was any evidence at all, which, if believed by the Tribunal, would establish the charge against the Police Officer. Adequacy of that evidence to sustain the charge is not a question before the High Court when exercising jurisdiction under Article 226 of the Constitution of India.

The contention that an Inspector of Police governed by the Madras District Police Act (Central Act XXIV of 1859) could be compulsorily retired only by one of the officers specified in section 10 of that Act and that the State Government has no such powers is untenable. Firstly, an order of compulsory retirement does not amount to an order of dismissal and therefore does not come within the language of section 10. Secondly, even if suchan order amounts, in the circumstances of a particular case, to an order of dismissal the State Governmentwould be competent to pass such an order because the provisions of section 10 are subject to thep rovisions of Article 311 of the Constitution of India and to the Rules framed under the Madras District Police Act *viz.*, Madras Police Subordinate Service (Discipline and Appeal) Rules. It is clear from rules 2 (*g*), 4 and 5 (*c*) of the above Rules that the State Government would be competent to compulsorily retire an Inspector of Police.

The State Government would also be competent to refer the charges against a Police Officer governed by the Madras District Police Act for enquiry by a Tribunal under the Madras Civil Services (Disciplinary Proceedings Tribunal) Rules, 1948 (hereinafter referred to as Tribunal Rules) and to act on the report of such Tribunal. It cannot be contended that the enquiry could be conducted only under the Madras Police Subordinate Service (Discipline and Appeal) Rules, 1950 (hereinafter referred to as Police Rules). No prejudice would be caused to the Police Officer concerned by the enquiry being conducted under the Tribunal Rules instead of under the Police Rules. The procedure to be followed during an enquiry both under the Police-Rules and the Tribunal Rules is substantially the same. It is not correct to say that no appeal lies against an order passed by the State Government acting on the report submitted by the Tribunal after an enquiry in accordance with the Tribunal Rules. The Tribunal Rules do not say that the order of the Government which is the authority competent to impose a penalty in cases enquired into by the Tribunal would be appealable or not. There is no reason why rule 5 of the Police Rules, which provides for an appeal against an order of the State Government, will not apply to the order passed by the Government after having the enquiry into the allegation against the Police Officer conducted by a Tribunal under the Tribunal Rules when an appeal lies against its order on the basis of an enquiry conducted through any other authority.

Appeal from the Judgment and Order dated 28th November, 1959 of the Madras High Court in Writ Appeal No. 54 of 1956.

A. Ranganadham Chetty, Senior Advocate, (*A. V. Rangam*, Advocate, with him), for Appellant.

F. S. Vaz, *R. Natarajan* and *M. S. Narasimhan*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Raghubar Dayal, J.—This appeal, by the State of Madras, on certificate granted by the High Court of Madras, raises the question about the power of the High

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*C.A. No. 400 of 1964. 9th October, 1964.

Court, when exercising jurisdiction under Article 226 of the Constitution, to consider the propriety and correctness of a finding of fact arrived at by the Government on the basis of an enquiry conducted by the Tribunal appointed under the provisions of the Madras Civil Services (Disciplinary Proceedings Tribunal) Rules, 1948, hereinafter referred to as the Tribunal Rules, framed by the Governor of Madras in connection with complaints against Government servants of the State. The question arises in this way.

Sundaram, respondent, was an Inspector of Police in the Madras State on 30th August, 1951 when he is said to have demanded bribe from one Muniswamy Chetty, hereinafter referred to as Munuswamy. The latter approached the authorities who arranged a trap. In pursuance of that scheme, Muniswamy paid Rs. 750 to the respondent after night-fall on 4th September, 1951. The officers taking part in the trap proceedings reached the spot on getting the pre-arranged signal from Muniswamy. The Government ordered an enquiry by G.O. Ms. No. 911 (Home) dated 8th March, 1952 and the Tribunal made the enquiry and submitted its report on 17th July, 1952. It found two charges, *viz.*, charges Nos. 1 and 4 to be established and recommended the respondent's dismissal from service. In making this recommendation the Tribunal said:

> "Without even taking his misconduct under Charge IV into consideration, the only punishment that would sufficiently meet his misconduct under Charge I is his dismissal from service."

Charge I was that the respondent, actuated by corrupt motives and in abuse of his position and authority, had on threats of prosecution for perjury, demanded an amount of Rs. 1,000 from Munuswamy on 30th August, 1951 and ultimately received an amount of Rs.750 from him in the early part of the night of 4th September, 1951 at the respondent's house at Vaniyambadi. Charge IV related to 7 items and the Tribunal found that the presents, by three Sub-Inspectors, were received personally by the respondent, that the presents referred to in three other items were given but it had not been proved that the respondent had knowledge of the presents and that the seventh item was not proved.

The Government, by its order dated 25th June, 1952, directed the compulsory retirement of the respondent from service instead of ordering his dismissal from service as recommended by the Tribunal. This order was passed after the Government had considered the findings and recommendations of the Tribunal, the representation of the respondent on the show cause notice issued to him and the fact that the Tribunal, when consulted about the contemplated alteration in the punishment, had adhered to its previous recommendation that the respondent be dismissed.

The respondent thereupon presented a Writ Petition under Article 226 to the High Court challenging the order of the Government retiring him compulsorily, on various grounds, including the competency of the Government to pass an order retiring him compulsorily, in view of the provisions of the Madras District Police Act, 1859 (Central Act XXIV of 1859), hereinafter called the Police Act, read with the Madras Police Subordinate Service (Discipline and Appeal) Rules, 1950, hereinafter referred to as the Police Rules, and the absence of any acceptable evidence to support the findings of the Tribunal accepted by the Government. The learned Single Judge who heard the Writ Petition, repelled both the contentions holding that the Government had jurisdiction to inflict the punishment of compulsory retirement and that the findings of the Tribunal were based on acceptable evidence of payment of the bribe to the respondent. The learned Judge could not accept the contention that there was no evidence at all on record to support of finding of fact arrived at by the Tribunal. It does not appear from the record that the finding on Charge IV was questioned before the Single Judge. He accordingly dismissed the Writ Petition.

The respondent then preferred a Letters Patent Appeal which was allowedt The High Court repelled the contention about the Government being not competen.

to order the compulsory retirement of the respondent, but held that the evidence about the respondent's demanding and accepting the bribe from Munuswamy was not sufficient to establish beyond reasonable doubt that he had actually demanded the bribe and received it. It formed the same opinion about the evidence with regard to Charge IV and stated that even if this charge was established it would have been insufficient by itself to merit the punishment that had been inflicted upon the respondent. It therefore set aside the order of the learned Single Judge and ordered the issue of a writ quashing the order of the Government compulsorily retiring the respondent from service. It is against this order that the State of Madras sought leave to appeal to this Court and the High Court granted the certificate as it considered the question "whether the High Court in a petition under Article 226, could examine the findings of a Disciplinary Tribunal and come to the conclusion whether the Government servant could be held to be guilty of any of the charges laid against him" to be a matter of general public importance.

It is well settled now that a High Court, in the exercise of its jurisdiction under Article 226 of the Constitution, cannot sit in appeal over the findings of fact recorded by a competent Tribunal in a properly conducted departmental enquiry except when it be shown that the impugned findings were not supported by any evidence. It was so held in *State of Orissa* v. *Murlidhar*[1] where it was said at page 408:

> "Whether or not the evidence on which the Tribunal relied was satisfactory and sufficient for justifying its conclusion would not fall to be considered in a writ petition. That in effect is the approach initially adopted by the High Court at the beginning of its judgment. However, in the subsequent part of the judgment the High Court appears to have been persuaded to appreciate the evidence for itself, and that, in our opinion, is not reasonable or legitimate."

Similar view was emphatically expressed in *State of Andhra Pradesh* v. *Sree Rama Rao*[2], wherein it was said at page 1726:

> "The High Court is not constituted in a proceeding under Art. 226 of the Constitution a Court of appeal over the decision of the authorities holding a departmental enquiry against a public servant; it is concerned to determine whether the enquiry is held by an authority competent in that behalf, and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Where there is some evidence, which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court in a petition for a writ under Art. 226 to review the evidence and to arrive at an independent finding on the evidence...But the departmental authorities are, if the enquiry is otherwise properly held, the sole judges of facts and if there be some legal evidence on which their findings can be based, the adequacy or reliability of that evidence is not a matter which can be permitted to be canvassed before the High Court in a proceeding for a writ under Article 226 of the Constitution."

It is therefore clear that the High Court was not competent to consider the question whether the evidence before the Tribunal and the Government was insufficient or unreliable to establish the charge against the respondent. It could have considered only the fact whether there was any evidence at all which, if believed by the Tribunal, would establish the charge against the respondent. Adequacy of that evidence to sustain the charge is not a question before the High Court when exercising its jurisdiction under Article 226 of the Constitution. This view was reiterated in *Union of India* v. *H. C. Goel*[3].

It is therefore clear that the High Court was in error in reappreciating the evidence before the Tribunal and recording the conclusion that that evidence did not establish the charges against the respondent. This is the only ground on which the Letters Patent Appeal has been allowed by the Division Bench, all other points urged by the respondent having been rejected by it. In the present appeal, the respondent has attempted to support the decision of the High Court under appeal on the ground that the findings recorded by the High Court on the said other points are erroneous. We will therefore deal with the said points one by one.

It is urged for the respondent that he is governed by the Police Act that an order of compulsory retirement amounts to an order of dismissal which could be passed

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1. A.I.R. 1963 S.C. 404.
2. (1964) 1 S.C.J. 402 : (1964) M.L.J. (Crl.) 221 : (1964) 1 M.L.J. (S.C.) 120 : (1964) 1 An. W.R. (S.C.) 120 : A.I.R. 1963 S.C. 1723 (1726).
3. A.I.R. 1964 S.C. 364.

only by one of the officers specified in section 10 of the Police Act and not by the State Government which is not given any power to pass such order. Section 10 of the Police Act reads :

"Subject to the provisions of Article 311 of the Constitution and to such Rules as the State Government may, from time to time, make under this Act, the Inspector-General, Deputy Inspector-General and District Superintendents of Police may at any time dismiss, suspend or reduce to a lower post, or time scale, or to a lower stage in time scale, any officer of the Subordinate Police whom they shall think remiss or negligent in the discharge of his duty or otherwise unfit for the same and may order the recovery from the pay of any such Police Officer of the whole or part of any pecuniary loss caused to Government by his negligence or breach of orders."

Firstly, an order of compulsory retirement does not amount to an order of dismissal and therefore does not come within the lauguage of this section. Secondly, the provisions of this section are subject to the provisions of Article 311 of the Constitution, and to the Rules framed by the State Government under the Police Act. If the order of compulsory retirement amounts, in the circumstances of this case, to an order of dismissal, the constitutional requirement of Article 311 that the respondent could not have been dismissed from service by an authority subordinate to that by which he was appointed has been satisfied. The respondent must have been appointed to the Police Service in 1929 by an authority subordinate to the State Government and therefore the State Government was competent to dismiss him.

The Police Rules were framed by the State Government in exercise of the powers conferred by section 10 of the Police Act and by certain other provisions including the proviso to Article 309 of the Constitution. Rule 2 of the Police Rules mentions the various penalties which can be imposed among the members of the service and mentions "compulsory retirement" in clause (*g*) as one such penalty. Rule 4 specifies the authority which may impose any of the penalties prescribed in rule 2 on a member of the service specified in column 1 of the Schedule to the Rules and states that it shall be the authority specified in the corresponding entry under columns 2 to 8 therefor, whichever is relevant or any higher authority. According to the entry in the Schedule, the authority competent to order compulsory retirement, removal or dismissal of an Inspector of Police in the districts, is the Deputy Inspector-General of Police. The State Government is an authority higher than the Deputy Inspector-General of Police. This cannot be gainsaid. It is however urged for the respondent that the higher authority contemplated by rule 4 is the authority higher in rank according to the provisions of the Police Act and that such an authority could be only the Inspector-General of Police. We do not agree with this contention.

The State Government can pass the various orders of punishment dealt with in the Schedule and this is clear from rule 5 which describes the forum to which a member of the Service can appeal from an order imposing any of the penalties specified in rule 2. According to clause (*c*), an appeal lies to the Governor if such an order imposing a penalty specified in rule 2 is passed by the State Government. We therefore agree with the High Court that the State Government was competent to order the compulsory retirement of the appellant.

Lastly, it was urged that the Government had no power to refer the case against the respondent to the Tribunal and act on its report and that the enquiry against him could be held only in accordance with the Rules. It is further urged that even if the enquiry could be made either in accordance with the Rules or by the Tribunal, the procedure provided for the enquiry by the Tribunal and the subsequent proceedings differs from similar procedure under the Rules in a way which is prejudicial to the interests of the Police Officer. We need not elaborately deal with these contentions as this Court had to deal with substantially the same contention in *Jagannath Prasad Sharma* v. *State of Uttar Pradesh*[1]. That case related to a Police Officer in Uttar Pradesh. The contentions raised were that the order dismissing him was unauthorized because the Governor had no power under section 7 of the Police Act V of 1861 and the Regulations framed thereunder to pass that order and further, even if the Governor could dismiss the Police Officer, a mode of enquiry prejudicial to the appellant in that case had been adopted out of two alternative modes of enquiry

1. (1962) 1 S.C.R. 151 (159).

and therefore the proceedings of the Tribunal which enquired into the charges against him were void on account of the equal protection clause of the Constitution. It may be mentioned that the appellant in that case was a Deputy Superintendent of Police and the Act applicable to him was the Police Act of 1861. Section 7 of that Act is practically identical with section 10 of the Madras Act. The rule-making power under both the Acts is with the State Government. The Rules made by the Uttar Pradesh Government are known as the Police Regulations. The U.P. Government made the Administrative Tribunal Rules in the exercise of powers conferred *inter alia* by section 7 of the 1861 Act just as the Madras Tribunal Rules were framed by the Governor of Madras in the exercise of powers conferred by section 241 of the Government of India Act, 1935 and of all other powers enabling the Governor to make Rules. Such powers include the powers under section 10 of the Police Act. In *Jagannath Prasad's case*[1], it was said at page 159 :

> "By virtue of Article 313, the Police Regulations as well as the Tribunal Rules in so far as they were not inconsistent with the provisions of the Constitution remained in operation after the Constitution. The authority vested in the Inspector-General of Police and his subordinates by section 7 of the Police Act was not exclusive. It was controlled by the Government of India Act, 1935, and the Constitution which made the tenure of all civil servants of a Province during the pleasure of the Governor of that Province. The plea that the Governor had no power to dismiss the appellant from service and such power could only be exercised by the Inspector-General of Police and the officers named in section 7 of the Police Act is therefore without substance."

It can be similarly said in the present case that the Tribunal Rules are applicable to the respondent, that the Governor had the power to retire him compulsorily and that consequently the Governor could refer the enquiry into the allegations against the respondent to the Tribunal.

We have carefully compared the provisions of rule 8 of the Tribunal Rules with rule 3 (*b*) of the Police Rules which lay down the procedure to be followed during the enquiry. The procedure to be followed is substantially the same. The Police Officer proceeded against is furnished with the appropriate charges he has to meet. The enquiry is conducted in his presence. The Police Officer is entitled to cross-examine the witnesses examined to give evidence in person and to have such witnesses called as he may wish. He can put in a written statement of defence and can argue orally in person. The procedure followed agrees in substance with what is laid down in the Rules and is in accordance with the requiremens of natural justice. It is not complained that there had been any irregularities in the course of the enquiry which prejudiced the respondent. The only difference between the provisions of the Tribunal Rules and the Police Rules is said to be that the Tribunal Rules do not provide for an appeal against the order of the Government while under the Police Rules an appeal is provided under rule 5.

If the order is of compulsory retirement passed by the State Government, the appeal lies to the Governor. The Tribunal Rules do not say that the order of the Government which is the authority competent to impose penalty in cases enquired into by the Tribunal would be appealable or not. There is no reason why rule 5 of the Police Rules will not apply to the order passed by Government after having the enquiry into the allegations against the police officer conducted by a Tribunal when an appeal lies against its order on the basis of an inquiry conducted through any other authority. The Rules do not specify the authority which is to enquire into the various complaints against a Police Officer governed by those Rules. They provide an appeal against the order of the State Government imposing any penalty referred to in rule 2 which would include an order made by the Government after considering the report of the Tribunal.

The record in the present case shows that the respondent did prefer an appeal to the Governor of Madras for reinstatement and that that appeal was rejected. It follows therefore that this conention about the enquiry by the Tribunl being prejudicial and about the respondent having been prejudiced has no substance as an appeal against the State Government is not barred under the Tribunal Rules and as factually the respondent did prefer an appeal against the order of compulsory retirement.

1. (1962) 1 S.C.R. 151 (159).

We are therefore of opinion that the High Court was in error in quashing the order of the State Government retiring the respondent compulsorily on the ground that the evidence during the inquiry proceedngs by the Tribunal was not sufficient to establish the charges against him beyond reasonable doubt. We accordingly allow the appeal, set aside the order of the Court below and restore the order of Government dated 25th June, 1953, ordering the compulsory retirement of the respondent from service. There will be no order as to costs.

V.K. *Appeal allowed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, RAGHUBAR DAYAL AND N. RAJAGOPALA AYYANGAR, JJ.

Mademsetty Satyanarayana .. *Appellant* *

v.

G. Yelloji Rao and others .. *Respondents.*

Specific Relief Act (*I of* 1877), *section* 22—*Limitation Act* (*IX of* 1908), *Article* 113—*Specific performance of contract—Relief of—When can be refused—Mere delay in filing suit for specific performance—Not sufficient to refuse the relief.*

Constitution of India (1950), *Article* 133—*Appeal to Supreme Court—Mixed question of law and fact cannot be raised for the first time.*

Under section 22 of the Specific Relief Act (I of 1877) relief of specific performance is discretionary but not arbitrary : discretion must be exercised in accordance with sound and reasonable judicial principles. The cases providing for a guide to Courts to exercise discretion one way or other are only illustrative ; they are not intended to be exhaustive. As Article 113 of the Limitation Act (IX of 1908) prescribes a period of 3 years from the date fixed thereunder for specific performance of a contract, it follows that mere delay without more extending upto the said period cannot possibly be a reason for a Court to exercise its discretion against giving a relief of specific performance. Nor can the scope of discretion, after excluding the cases mentioned in section 22 of the Specific Relief Act, be confined to waiver, abandonment or estoppel. If one of these three circumstances is established, no question of discretion arises, for either there will be no subsisting right or there will be a bar against its assertion. So, there must be some discretionary field unoccupied by the three cases, otherwise the substantive section becomes otiose. It is really difficult to define that field. Diverse situations may arise which may induce a Court not to exercise the discretion in favour of the plaintiff. It may better be left undefined.

In England the relief of specific performance pertains to the domain of equity ; in India, to that of statutory law. In England there is no period of limitation for institution of a suit for the said relief. Hence while in England mere delay or laches, the time lag depending on circumstances, may be a ground for refusing specific performance, in India mere delay without such conduct on the part of the plaintiff as would cause prejudice to the defendant does not empower a Court to refuse such a relief. But as in England so in India, proof of abandonment or waiver of his rights by the plaintiff, waiver being understood in the sense of an agreement to release or not to assert a right, is not a pre-condition necessary to disentitle the plaintiff to the said relief, for if a abandonment or waiver is established, no question of discretion on the part of the Court would arise. The conduct of a party which puts the other party in a disadvantageous position, though it does not amount to waiver or abandonment, may in certain circumstances preclude him from obtaining a decree for specific performance. It is not possible or desirable to lay down the circumstances under which a Court can exercise its discretion against the plaintiff. But they must be such that the representation by or the conduct or neglect of the plaintiff is directly responsible in inducing the defendant to change his position to his prejudice or such as to bring about a situation when it would be inequitable to give him such a relief.

When the case of the defendant throughout was that there was no contract at all and not that he was induced to act to his detriment by the conduct of the plaintiff, the relief of specific performance cannot be refused merely because there was a delay of about 7½ months on the part of the plaintiff in bringing the suit for specific performance of the contract.

A mixed question of law and fact which has not been raised in the pleadings and with respect to which no issue was raised and no arguments were addressed in the lower Courts, cannot be raised for the first time before the Supreme Court.

Appeal from the Judgment and Decree dated the 11th October, 1963, of the Andhra Pradesh High Court in C.C.C. Appeal No. 12 of 1959.†

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* C.A. 669 of 1964. 24th November, 1964.

† (1964) 1 An.W.R. 312.

T. Lakshmayya and *P. Shiv Shanker*, Advocates and *O. C. Mathur*, *J. B. Dadachanji* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, for Appellant.

A. V. Viswanatha Sastri, Senior Advocate (*C. Narasimhachar* and *Harbans Singh*, Advocates, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Subba Rao, J.—This appeal by certificate raises the question whether the High Court went wrong, in the circumstances of the case, to give a decree for specific performance of an agreement to sell in favour of the plaintiff.

The facts may be briefly stated: On 23rd August, 1954, at 10 A.M. defendants 1 and 2, through their Auction Agent, defendant 3, advertised and put their plots Nos. 1 to 4 situated in Narayanguda opposite to Deepak Mahal Theatre to public auction. In regard to plots Nos. 2 and 3 the plaintiff offered the highest bid of Rs. 12,000. He wanted to purchase the plots for the purpose of starting his business. When the plaintiff tendered one-fourth of the sale price as earnest money in accordance with the terms of the auction, the defendants unlawfully refused to accept it. On 30th August, 1954, the plaintiff gave notice to the 3rd defendant and sent copies thereof to the other defendants calling upon them to obtain from him the one-fourth amount of the sale price as earnest money within 24 hours and pass a receipt therefor and accept the balance of the auction price within a period of one week thereafter in accordance with the conditions of the auction sale and to execute a sale deed duly registered in his favour. Defendants 1 and 2 did not give any reply to the said notice. The plaintiff filed the suit in the Court of the 4th Additional Judge, City Civil Court, Hyderabad, on 18th April, 1955, for directing the defendants, *inter alia*, to execute the sale deed in his favour. Defendants 2 and 3 in their written-statement admitted that there was an auction sale and that plaintiff was the highest bidder; but the 1st defendant, on the other hand, denied that there was any final bid or that it was accepted. He further stated that he gave up the idea of selling the plots and that after obtaining the necessary permission from the Municipality he began to build shops on the said plots. The City Civil Court Judge held that the suit plots were knocked down at the auction in favour of the plaintiff and that the 1st defendant refused to take the earnest money. He further held that though the plaintiff gave notice as early as 30th August, 1954, to the defendants, he did not take any steps to enforce his contract and that though he knew of the construction a couple of months before he filed the suit, he kept quiet and allowed the 1st defendant to complete his construction and, therefore, it was not a fit case where he could, in exercise of his discretion, give a decree for specific performance; instead he awarded to the plaintiff a sum of Rs. 500 towards damages. On appeal, a Division Bench of the Andhra Pradesh High Court, on a consideration of the evidence, came to the conclusion that the delay in filing the suit was due to the illness of the plaintiff's wife and also on account of the demolition of one of his houses by the Municipal Corporation, that he came to know for the first time on 13th April, 1955, that the 1st defendant was raising a structure on the suit plots and that without any loss of time within a few days thereafter he filed the suit. The High Court also found that the 1st defendant did not act *bona fide* inasmuch as he chose to rush headlong in raising the structure evidently to defeat the claims of the plaintiff. On those findings, the High Court held that the trial Court went wrong on principle in exercising its discretion in favour of the defendants and in refusing to grant a decree for specific performance in favour of the plaintiff. In the result, the High Court set aside the decree of the Trial Court and gave a decree for specific performance in favour of the plaintiff on his depositing a sum of Rs. 12,000 together with stamp papers, and registration charges within a month from the date of the decree. It may also be mentioned that the learned Counsel for the plaintiff made an offer that his client was willing to pay a sum of Rs. 14,750 towards the costs of the building put up by defendants 1 and 2 on the suit plots and the Court recorded the same. But, the High Court left it to the said defendants either to give vacant possession of the plots or with the structure thereon accepting

money for it, as they chose. The 1st defendant has preferred this appeal by certificate to this Court making the plaintiff the 1st respondent, and defendants 2 and 3, respondents 2 and 3.

Mr. Lakshmaiah, learned Counsel for the appellant, argued : (1) The appellant repudiated the contract on the next day of the auction itself by refusing to take money from the 1st respondent ; the 1st respondent did not accept the repudiation, but elected to keep the contract alive by asking the appellant to receive from him one-fourth of the amount as earnest money at any time within 24 hours thereof and to obtain from him the entire balance within one week thereafter ; by so doing, he not only unilaterally varied the terms of the contract but committed a breach thereof in not paying the amount ; having himself committed a breach of the contract, he could not specifically enforce it. (2) Time is the essence of the contract, as the object of purchase by the 1st respondent was to start a business ; therefore, the 1st respondent should have pursued his remedy with promptitude and diligence. It was not enough to assert his right by issuing a notice, but he should have taken steps to enforce it : his inaction and indifference for 7½ months without making any attempt to enforce his right would disentitle him to the discretionary relief of specific performance. (3) The reasons for the delay, namely, that the 1st respondent's wife was ill or that one of his houses was demolished by the Municipal Corporation, were obviously untenable excuses, for both the reasons existed even before the auction was held.

Mr. A. V. Viswanatha Sastri, learned Counsel for the 1st respondent, on the other hand, contended as follows : (1) Mere delay in filing a suit for specific performance could not possibly be a ground for exercising a discretion against a plaintiff, as the Limitation Act prescribed a period of 3 years for filing such a suit. (2) Under the Indian Law relief of specific performance could be refused only if the plaintiff abandons or waives his right under the contract; and in the present case the appellant had not established either abandonment or waiver by the 1st respondent of his right under the contract, for indeed as soon as he saw that the appellant had laid foundations for putting up structures on the plots, he rushed without any delay to the Court and filed the suit. (3) In the circumstances of the instant case there is no scope for holding that the appellant could have had any reasonable belief that the 1st respondent had waived or abandoned his right, for it was the positive case of the appellant that there was no concluded sale at all.

We cannot allow the learned Counsel for the appellant to raise before us the first question, namely, that the 1st respondent did not accept the repudiation but kept the contract alive and committed a breach thereof, with the result that he disqualified himself to file the suit for specific relief, for the said plea was not raised in the pleadings, no issue was raised in respect thereof and no arguments were addressed either in the trial Court or in the High Court. As the question is a mixed question of fact and law, we cannot permit the appellant to raise if for the first time before us.

At the outset we shall construe the relevant sections of the Specific Relief Act and the Limitation Act unhampered by judicial decisions.

SPECIFIC RELIEF ACT : *Section* 22.—The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do sol but the discretion of the Court is not arbitrary but sound and reasonable guided by judicia; principles and capable of correction by a Court of Appeal.

The following are cases in which the Court may properly exercise a discretion not to decree specific performance:—

(i) Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or mis-representation on the plaintiff's part.

Illustrations

* * *

(ii) Where the performance of the contract would involve some hardship on the defendant which he did not foresee, where as its non-performance would involve no such hardship on the plaintiff

Illustrations

* * *

The following is case in which the Court may properly exercise a discretion to decree specific performance :—

(iii) Where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

Illustrations.

* * *

The First Schedule to the Limitation Act.

Description of suit.	*Period of limitation.*	*Time from which period begins to run.*
Art. 113. For specific performance of a contract.	Three years ..	The date fixed for the performance, or, if no such date is fixed when..the plaintiff has notice that performance is refused.

Under section 22 of the Specific Relief Act, relief of specific performance is discretionary but not arbitrary : discretion must be exercised in accordance with sound and reasonable judicial principles. The cases providing for a guide to Courts to exercise discretion one way or other are only illustrative ; they are not intended to be exhaustive. As Article 113 of the Limitation Act prescribes a period of 3 years from the date fixed thereunder for specific performance of a contract, it follows that mere delay without more extending up to the said period cannot possibly be a reason for a Court to exercise its discretion against giving a relief of specific performance. Nor can the scope of the discretion, after excluding the cases mentioned in section 22 of the Specific Relief Act, be confined to waiver, abandonment or estoppel. If one of these three circumstances is established, no question of discretion arises, for either there will be no subsisting right or there will be a bar against its assertion. So, there must be some discretionary field unoccupied by the three cases, otherwise the substantive section becomes otiose. It is really difficult to define that field. Diverse situations may arise which may induce a Court not to exercise the discretion in favour of the plaintiff. It may better be left undefined except to state what the section says, namely, discretion of the Court is not arbitrary, but sound and reasonable guided by judicial principles and capable of correction by a Court of appeal.

Mr. Lakshmaiah cited a long catena of English decisions to define the scope of a Court's discretion. Before referring to them, it is necessary to know the fundamental difference between the two systems—English and Indian-*qua* the relief of specific performance. In England the relief of specific performance pertains to the domain of equity ; in India, to that of statutory law. In England there is no period of limitation for instituting a suit for the said relief and, therefore, mere delay—the time lag depending upon circumstances—may itself be sufficient to refuse the relief ; but, in India mere delay cannot be a ground for refusing the said relief, for the statute prescribes the period of limitation. If the suit is in time, delay is sanctioned by law ; if it is beyond time, the suit will be dismissed as barred by time ; in either case, no question of equity arises.

With this background let us look at the English text-books and decisions relied upon by the learned Counsel for the appellant. In Halsbury's Laws of England, Volume 36, at page 324, it is stated :

" Where time is not originally of the essence of the contract, and has not been made so by due notice, delay by a party in performing his part of the contract, or in commencing or prosecuting the enforcement of his rights, may constitute such laches or acquiescence as will debar him from obtaining specific performance. The extent of delay which has this effect varies with circumstances, but as a rule must be capable of being construed as amounting to an abandonment of the contract. A much

shorter period of delay, however, suffices if it is delay in declaring an option or exercising any other unilateral right; and if the other party has already given notice that he does not intend to perform the contract, the party aggrieved must take proceedings promptly if he desires to obtain specific performance.'"

In "Fry on Specific Performance," 6th Edition, at page 517, it is said:

> "Where one party to the contract has given notice to the other that he will not perform it, acquiescence in this by the other party, by a comparatively brief delay in enforcing his right, will be a bar: so that in one case two years' delay in filing a bill after such notice, in another case one year's delay, and in a third (where the contract was for a lease of collieries) five months' delay was held to exclude the intervention of the Court."

Learned Counsel cited many English decisions in support of his argument that there shall be promptitude and diligence in enforcing a claim for specific performance after repudiation of the contract by the other party and that mere continual claim without any active steps will not keep alive the right which would otherwise be defeated by laches: see *Clegg* v. *Edmondson*[1], *Eads* v. *Williams*[2], *Lehmann* v. *McArthur*[3], *Watson* v. *Reid*[4], and *Emile Erlanger* v. *The New Sombrero Phosphate Company*[5]. But as stated earlier, the English principles based upon mere delay can have no application in India where the statute prescribes the time for enforcing the claim for specific performance. But another class of cases which dealt with the doctrine of laches have some bearing in the Indian context. In *The Lindsay Petroleum Company* v. *Prosper Armstrong Hurd, Abram Farewell and John Kemp*[6] Sir Barnes Peacock defined the doctrine thus:

> "Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material."

This passage indicates that either waiver or conduct equivalent to waiver along with delay may be a ground for refusing to give a decree for specific performance In *Caesar Lamare* v. *Thomas Dixon*[7], Lord Chelmsford said:

> "The conduct of the party applying for relief is always an important element for consideration."

The House of Lords in *Emile Erlanger* v. *The New Sombrero Phosphate Company*[5] approved the passage in *The Lindsay Petroleum Company* v. *Prosper Armstrong Hurd, Abram Farewell and John Kemp*[6] which we have extracted earlier.

It is clear from these decisions that the conduct of a party which puts the other party in a disadvantageous position, though it does not amount to waiver, may in certain circumstances preculde him from obtaining a decree for specific performance.

Now we shall consider some of the Indian decisions cited at the Bar. A Division Bench of the Allahabad High Court held in *Nawab Begum* v. *A. H. Creet*[8] that great delay on the part of the plaintiff in applying to the Court for specific performance of a contract of which he claimed the benefit was of itself a sufficient reason for the Court in the exercise of its discretion to refuse relief. But it will be seen from the facts of that case that apart from the delay the conduct of the plaintiff was such that it induced the other party to change his position to his detrement. A Division Bench of the Patna High Court in *Rameshwar Prasad Sahi* v. *Mt. Anandi Devi*[9] held on the facts of that case that the delay in bringing the suit for specific performance was always fatal to a suit, and that it amounted to an abandonment of the contract and waiver of his rights to sue for specific performance. If the learned Judges meant to lay down that mere delay would amount to abandonment of a right, we find it difficult to agree with them. The decision of the Calcutta High Court in *Gosthe Behari* v. *Omiyo Prosad*[10] recognized that mere delay was not sufficient to deny the relief of specific performance, but pointed out that though it was not necessary to establish that the plaintiff had abandoned his right, the Court may, in view

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1. (1857) 114 R.R. 336.
2. (1854) 43 E.R. Chan. 671.
3. (1868) L.R. 3 Ch. A.C. 496.
4. (1830) 39 E.R. Chan. 91.
5. (1878) L.R. 3 A.C. 1218.
6. (1874) L.R. 5 P.C.A. 221, 239-240.
7. (1873) 6 H.L.C. 414, 423.
8. (1905) I.L.R. 27 All. 678.
9. (1960) I.L.R. 39 Pat. 79.
10. A.I.R. 1960 Cal. 361.

of the conduct of the plaintiff coupled with his delay that had prejudiced the defendant, refuse to give the equitable relief. In *Chamarti Suryaprakasarayudu* v. *Arardhi Lakshminarasimha*[1], a Division Bench of the Madras High Court rightly pointed out that delay by itself was not a ground for refusing to give a decree in a suit for specific performance. Sadasiva Aiyar, J., observed :

"I think that it is an error of law to hold that mere delay amounts to a waiver or abandonment apart from other facts or circumstances or conduct of the plaintiff indicating that the delay was due to a waiver or abandonment of the contract on the plaintiff's part."

Seshagiri Aiyar, J., said much to the same effect, thus :

"There is nothing in the Specific Relief Act which says that laches in bringing a suit will by itself be a ground for refusing specific performance..........Having regard to the fact that a special period of limitation has been fixed for bringing a suit for specific performance, I think the Legislature has not intended that mere laches should be one of the grounds for refusing specific performance."

We do not think, though the observations of Sadasiva Aiyar, J., are rather wide, that the learned Judges intended to lay down that unless there is a waiver or abandonment by the plaintiff of his rights to sue for specific performance, he should be non-suited, for if that was the law, as we have pointed out earlier, the substantive part of section 22 of the Specific Relief Act would become nugatory. A Division Bench of the Calcutta High Court in *Jadu Nath Gupta* v. *Chandra Bhusan*[2] again emphasized the fact that the English doctrine of delay and laches showing negligence in seeking relief in a Court of equity cannot be imported into the Indian law in view of Article 113 of the Limitation Act. But it pointed out that where the conduct of the plaintiff was such that it did not amount to abandonment but showed waiver or acquiescence especially when inaction on his part induced the defendant to change his position, the plaintiff ought not to be allowed any relief. This case brings out not only the distinction between English and Indian law but also that waiver or abandonment of a right is not a pre-condition for refusing relief of specific performance.

The result of the aforesaid discussion of the case-law may be briefly stated thus : While in England mere delay or laches may be a ground for refusing to give a relief of specific performance, in India mere delay without such conduct on the part of the plaintiff as would cause prejudice to the defendant does not empower a Court to refuse such a relief. But as in England so in India, proof of abandonment or waiver of a right is not a pre-condition necessary to disentitle the plaintiff to the said relief, for if abandonment or waiver is established, no question of discretion on the part of the Court would arise. We have used the expression "waiver" in its legally accepted sense, namely, "waiver is contractual, and may constitute a cause of action : it is an agreement to release or not to assert a right" ; see *Dawson's Bank, Ltd.* v. *Nippon Menkwa Kabushiki Kaisha*[3]. It is not possible or desirable to lay down the circumstances under which a Court can exercise its discretion against the plaintiff. But they must be such that the representation by or the conduct or neglect of the plaintiff is directly responsible in inducing the defendant to change his position to his prejudice or such as to bring about a situation when it would be inequitable to give him such a relief.

Bearing these principles in mind let us now look at the facts of the case. Both the lower Courts found that the appellant repudiated the contract even on the next day of the auction, *i.e.*, 24th August, 1954. The 1st respondent issued a notice to the appellant on 30th August, 1954, asking him to obtain from him one-fourth of the auction price as earnest money at any time within 24 hours and the balance within a period of one week thereafter and execute a sale deed in his favour. The appellant did not reply to this notice. The 1st respondent in his evidence says that he could not take effective steps to enforce the contract for a period of 7 months as his wife was ill and as the Hyderabad Municipal Corporation had demolished one of his houses. The High Court accepted the explanation given by the 1st respondent for the delay in his taking steps in enforcing the contract. In the affidavit filed by the 1st respondent in the Trial Court on 18th October, 1955, he stated

1. (1914) 26 M.L.J. 518, 521, 523.
2. A.I.R. 1932 Cal. 493.
3. (1935) 68 M.L.J. 725 : L.R. 62 I.A. 100, 108 : A.I.R. 1935 P.C. 79.

that his house had been demolished by the Municipal Corporation before a year and a half and his wife was also seriously ill for the "last two years" and that, therefore, he was worried. From this statement it is argued that both the circumstances which are said to have been the reasons for the delay were in existence even before the auction and, therefore, the High Court went wrong in accepting the explanation of the 1st respondent for the delay. It is true that the 1st respondent's wife was ill even before the auction, but she continued to be ill even after the auction and there is clear evidence that she was being treated in a hospital. This continual illness of the 1st respondent's wife must have unnerved him and when the High Court accepted his evidence we cannot say that it went wrong. It is also true that the notice by the Municipal Corporation to demolish the house was given two months prior to the auction, but there is nothing on the record to show when the house was actually demolished. Some time must have elapsed between the notice and the actual demolition. The only evidence in regard to the demolition of the house is that of the 1st respondent; and it is not suggested in the cross-examination that the demolition of the house was before the auction. On the uncontradicted evidence of the 1st respondent, we must hold, agreeing with the High Court, that the 1st respondent was in a worried state of mind because of the said two circumstances which might have been responsible, to some extent, for his not taking immediate active and effective steps to enforce his right. The most important circumstance in the case is, when did the 1st respondent come to know of the commencement of the building operations by the appellant on the suit site? The 1st respondent says in his evidence that 7 or 8 months after the auction he passed by the suit site and saw foundations had been dug therein and a few days thereafter he filed the suit. The appellant, on the other hand, says in his evidence that he started the construction after the disputed auction and that it was completed in 5 or 6 months. Though he says in the cross-examination that he applied to the Municipality for permission to build, he did not produce either a copy of that application or the sanction issued to him by the Municipality. He is not even prepared to deny that he got the sanction only in March, 1955. The Trial Court surmised without any evidence that at the time the 1st respondent saw the foundations the stage of the construction indicated that the building operations must have commenced two months earlier. The High Court rightly pointed out that it was a pure surmise and accepted the evidence of the 1st respondent that a few days after he saw the foundations being dug in the suit site he filed the suit. But all these are beside the point, for it is not the case of the appellant that because of the 1st respondent's conduct he was induced to put up the building at a heavy cost: his case throughout was that there was no contract at all. If so, there was no question of his being induced to act to his detriment because of the conduct of the 1st respondent. Therefore, except for some delay, there are no circumstances within the meaning of the aforesaid decisions which should induce a Court to refuse in its discretion to give a relief of specific performance. The High Court rightly held that it was a fit case where the plaintiff should have been given a relief of specific performance.

In the result, the appeal fails and is dismissed with costs.

V.K. *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

The Official Receiver, Kanpur and another .. *Appellants* *

v.

Abdul Shakoor and others .. *Respondents.*

Provincial Insolvency Act (V of 1920), section 33—Proof of debt—Claim on negotiable instrument—Estoppel as to consideration for the instrument under section 118 of Negotiable Instruments Act (XXVI of 1881)—If applicable in insolvency proceedings.

In a proceeding relating to proof of debts the question which arises being not one between the insolvent and the proving creditor, alone the rights of other creditors of the insolvent have of necessity to be considered. Even if for some reason the debtor himself is estopped from denying the debt there will be no estoppel against the Insolvency Court.

The Court has power to insist upon proof of the debt apart from the judgment or the negotiable or other instrument.

Section 114 of the Evidence Act enables the Court to presume though not obliged to do so, that a bill of exchange or a promissory note was founded on a good consideration. Section 118 of the Negotiable Instruments Act however enacts a special rule of evidence which operates between parties to the instrument or persons claiming under them in a suit or proceeding relating to the bill of exchange and does not affect the rule contained in section 114 of the Evidence Act in cases not falling within section 118 of the Negotiable Instruments Act.

Appeal from the Judgment and Decree dated 19th February, 1957 of the Allahabad High Court in S.A.F. No. 4 of 1952.

S. T. Desai, Senior Advocate (*J. P. Goyal*, Advocate, with him), for Appellant.

G. S. Pathak, Senior Advocate, (*B. Dutta*, Advocate and *J. B. Dadachanji*, *O. C. Mathur* and *Ravider Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Respondent No. 2.

The Judgment of the Court was delivered by

Shah, J.—Respondents 1 to 3 in this appeal presented a petition before the Insolvency Judge, Kanpur, for an order adjudicating the second appellant—Kotwaleshwar Prasad—insolvent. In their petition they alleged that Kotwaleshwar had in the course of business dealing with them borrowed Rs. 15,000 on 28th September, 1935 from respondents 1 and 3 and had executed a promissory note agreeing to repay the amount, and that he had borrowed Rs. 3,500 on 9th January, 1936 and Rs. 4,000 on 7th April, 1936 from respondent 2, and executed similar promissory notes, that he had failed to repay the amounts due by him and with a view to defeat or delay his creditors secluded himself so as to deprive his creditors of the means of communicating with him, and had thereby committed an act of insolvency. The Insolvency Judge by order dated 8th October, 1937, adjudicated Kotwaleshwar insolvent and appointed the first appellant the Official Receiver, Kanpur, as Receiver of his estate with powers under section 80 of the Provincial Insovency Act, 1920—hereinafter called 'the Act.'

The Receiver proceeded in exercise of the powers under section 33 read with section 80 of the Act to frame a schedule of debts. The claims set up by the respondents were challenged by Kotwaleshwar and a creditor named Abdul Sayed, but the Official Receiver included the claims of the respondents in the schedule of debts, for in his view Kotwaleshwar had admitted the claims on 8th October, 1937 before the Insolvency Court.

In appeal under section 68 to the Insolvency Judge the matter was remanded that (*sic*) the promissory notes were executed by Kotwaleshwar under the debts due to the respondents. The Official Receiver then held a further enquiry and rejected

* C.A. No. 257 of 1962. 11th September, 1964.

the claims of the respondents 1 to 3. He held that it was not proved that Kotwaleshwar had received consideration for the three promissory notes. In the view of the Official Receiver the documentary evidence produced by Kotwaleshwar and the respondents established that the promissory notes were executed by Kotwaleshwar under the influence of respondents 1 to 3 and their servant Amir Hassan and that the evidence including the books of account of respondents 1 to 3 in support of the advance of consideration under the promissory notes was unreliable.

In appeal against the order of the Official Receiver, the Insolvency Judge, Kanpur, directed that the names of respondents 1 to 3 be included in the schedule of creditors. In the view of the Insolvency Judge the presumption of consideration arising under section 118 of the Negotiable Instruments Act supported the rest of the evidence which was directed to establish the genuineness of the signatures and the endorsements of execution on the promissory notes by Kotwaleshwar and on receipts executed by him and that the *Kaski Rokar* of the respondents were adequately corroborated by the evidence of the creditors, their witness Abdul Rashid and others and that Kotwaleshwar had failed to discharge the burden which lay heavily on him to establish want of consideration.

Against the order of the Insolvency Judge an appeal was preferred to the District Court, Kanpur. During the pendency of the appeal respondents 1 and 3 were declared evacuees under the Administration of Evacuee Property Act and the Assistant Custodian of Evacuee Property in whom their property had vested was impleaded as a party respondent. In the view of the District Court the testimony of witnesses of the respondents in support of the plea of payment of consideration was unreliable and that the admission made by Kotwaleshwar before the Insolvency Judge on 8th October, 1937 was procured by the exercise of undue influence and that the books of account relied upon by the respondents and the oral evidence in support thereof were unreliable. The District Judge observed that the presumption under section 118 of the Negotiable Instruments Act in respect of the promissory notes did arise, but it stood in the circumstances of the case weakened and the burden shifted to respondents 1 to 3, to prove affirmatively that the sums covered by the three promissory notes were in fact paid to the insolvent and that they failed to discharge the burden.

Against the order passed by the District Judge, a second appeal being No. 4 of 1952 was preferred under section 75 (1), proviso 2 of the Provincial Insolvency Act, 1920 to the High Court of Allahabad. The Division Bench hearing the appeal referred the following two questions to a Full Bench. These questions were :

(1) Whether the presumption mentioned in clause (*a*) of section 118, Negotiable Instruments Act, 1881, can be invoked in insolvency proceedings where an alleged debt against the insolvent is called in question by the Official Receiver or by a creditor or by the insolvent ?

(2) If it can be invoked, would circumstances tending to make it doubtful that consideration passed under the negotiable instrument even though coupled with a denial on the part of the maker of the instrument, suffice to deprive the creditor of the benefit of the presumption and require him to prove by evidence that consideration did actually pass ?

A Full Bench of the High Court by majority having recorded an affirmative answer on the first question, the Second Appeal was placed for hearing before a Division Bench of the High Court. The Division Bench observed that the District Court had recorded certain findings and from those findings it had inferred as a matter of law that the statutory presumption under section 118 of the Negotiable Instrument Act stood rebutted. The High Court then observed :

"The correctness, or otherwise, of the preliminary inference must need (*sic*) be considered first. Scrutiny of that inference should however be prefaced with the observation that it is open to question not only because the various findings, or at least the material ones, described as circumstances by the Court below, whereon that inference was based suffer from one or the other of the legal defects pointed out above, but also because the inference drawn by that Court of a result of its view that the statutory presumption stood refutted was a finding on a question of law and not on a question of fact. That inference, or finding, of the Court below was that the onus of proving consideration had shifted on to the creditors. * * * * * * * A finding which has to draw on a rule of law for the recording of it or for the ascertainment of its truth is a finding on a question of law, any other a finding on a question of fact. The finding that onus has shifted has to

draw on the rules of pleading and proof, of procedure and evidence, for the recording of it as well as for the ascertainment of its truth. It is therefore a finding on a question of law."

The Court then held that in the case before it

"not only had the insolvent failed to displace, or even to weaken, the presumption in favour of the creditors under section 118 of the Negotiable Instruments Act, but the consideration stood fully established, even if there was no initial presumption in favour of the creditors, by the evidence adduced by them and by the insolvent's own admission."

With Special Leave, this appeal is preferred by the Official Receiver and Kotwaleshwar.

The District Court found on the evidence that the insolvent's father died in 1933 leaving considerable properties, that the insolvent was at the time of his father's death a young man about 20 years of age, inexperienced and open to all the temptations of early life, that the insolvent "got mixed up" with Amir Hassan and others and "they initiated him into the mysteries of wine and women", that although the promissory notes were not executed "under the influence of drink," there were grounds for holding that he was under the influence of Amir Hassan when he signed them, that it was significant that the three promissory notes were executed in quick succession and at that time the insolvent was already indebted to other creditors to the extent of Rs. 6,000, that the respondents had no previous business relations with the insolvent, that although the creditors knew that the insolvent's share in the property left by his father was only Rs. 28,000 to Rs. 30,000 and that he was joint in estate with his brother, no kind of security was taken from the insolvent, nor was any enquiry made whether the said property was encumbered or not, that respondent 3 Abdul Wahid admitted that about 2¼ months after the execution of the promissory note dated 28th September, 1935 he came to know that the insolvent was executing "bogus and fictitious promissory notes" in favour of his friends to defraud his real creditors, and therefore it was incredible that further sums should have been advanced under the two subsequent promissory notes of the aggregate value of Rs. 7,500, that the insolvent was "fairly well off for his ordinary needs" and there was no apparent reason why he should have borrowed those considerable sums of money, that the respondents did not have sufficient funds or resources with them to advance either the amounts covered by the three promissory notes or those under the prior promissory notes of 4th September, 1935 and 15th September, 1935, that the thumb impression of the insolvent had been taken in addition to his signatures on the promissory notes, and that his signatures were also obtained on the *Rokar Bahi*, that the oral evidence produced by the respondents in proof of the payment of consideration did not inspire confidence that the admission of the insolvent dated 8th October, 1937 on the foot of which the order of adjudication was passed appeared to have been made in suspicious circumstances and it was an erroneous admission and therefore did not bind the insolvent and that the *Bahi Khatas* of the creditors were of a suspicious character. All these findings were findings of fact. The District Court inferred from the facts found that the statutory presumption under section 118 of the Negotiable Instruments Act had been weakened and the burden which lay upon the insolvent was discharged and it was not open to the High Court exercising jurisdiction under section 75 (1), proviso 1, nor even under proviso 2, of the Provincial Insolvency Act to set aside the judgment of the District Court, for it is well settled that the question whether a statutory presumption is rebutted by the rest of the evidence is a question of fact: *Wali Mohammad* v. *Mohammad Bakhush*[1].

This would be sufficient to dispose of the appeal. But the question whether the Official Receiver is bound to give effect to the statutory presumption in respect of a negotiable instrument arising under section 118 of the Negotiable Instruments Act when the negotiable instrument is sought to be relied upon by a creditor in the course of the insolvency proceeding in proof of the debts to be entered in the schedule of creditors, has been fully argued before us and as the High Court has overruled an earlier decision of that Court: *Ram Lal Tandon* v. *Kashi Charan*[2], and

1. (1929) L.R. 57 I.A. 86, 92 : 59 M.L.J. 53. 2. A.I.R. 1928 All. 380.

as the question is of some importance, we deem it necessary to express our opinion on that question.

Section 33 of the Provincial Insolvency Act by the first sub-section provides :-

"When an order of adjudication has been made under this Act, all persons alleging themselves to be creditors of the insolvent in respect of debts provable under this Act shall tender proof of their respective debts by producing evidence of the amount and particulars thereof, and the Court shall, 'by order', determine the persons who have proved themselves to be creditors of the insolvent in respect of such debts, and the amount of such debts, respectively, and shall frame a schedule of such persons and debts :

Provided * * * * * * ."

The Act imposes a duty upon the Court to frame a schedule of creditors and of the debts due to them which are provable under the Act. For that purpose the Court has to hold an enquiry into the debts due by the insolvent which are provable.

A proceeding under section 33 of the Provincial Insolvency Act is not a proceeding between the insolvent and the proving creditor. The proceeding is between the creditors represented by the Official Receiver and the insolvent. When a creditor, seeking to prove a debt relying upon a negotiable instrument, or other evidence makes a claim for inclusion of the debt due to him, the Court, or where he is authorised the Receiver of the estate of the insolvent, has to be satisfied about the existence of the debt, the amount due, its particulars and that it is provable in insolvency. Section 33 does not indicate the quantum of proof which may be regarded as sufficient to prove a debt. A Court may accept in proof of a debt a registered letter to the Court and an affidavit verifying the debt : (see section 49 of the Act). That however is a matter of procedure, and does not lay down as to what is sufficient to prove the debt. In each case it is for the Court or the Receiver (subject of course to review in the manner provided by the Act) to consider whether the debt of which the creditor claims inclusion is proved. The decision of the question must of necessity depend upon the circumstances and the evidence led to prove the debt.

In the present case the High Court by majority took the view that in a proceeding under section 33 when the promissory note is brought before the Court by the promisee, a presumption that the promissory note was made for consideration arises under section 118 of the Negotiable Instruments Act and unless that presumption is rebutted by the promisor or by other creditors or by the Receiver the amount for which the promissory note is executed must be included in the schedule. In so holding the High Court primarily relied upon absence of any reference to the nature of the proceeding in which the presumptions are required to be raised in relation to negotiable instruments.

It must be noticed in the first instance that presumption under section 118 of the Negotiable Instruments Act is a presumption of consideration : it does not in all cases prove the quantum of debt due by the insolvent at the date of insolvency. The Insolvency Court has, it must be remembered, to ascertain whether a debt is due by the insolvent, whether the debt is provable in insolvency, and the quantum of the debt due at the material date. In making this enquiry in its three aspects even the judgment of a Court against the debtor may not be regarded as binding upon the Court. In *Ex Parte Lennox*[1], it was held that a judgment which the judgment-debtor cannot set aside, may still be subjected to investigation by the Court of Bankruptcy to enquire whether the debt on which the judgment was founded was a good debt, and if the Court be satisfied that it was not, the Court may refuse to make a receiving order in respect of the debt. The principle of that case was extended in In re *Fraser Ex Parte Central Bank of London*[2]. It was held in that case that

"upon the hearing of a creditor's petition for a receiving order against a judgment-debtor, the Court of Bankruptcy has power, at the instance of the debtor himself, to go behind the judgment and to inquire into the validity of the debt, even though the debtor has previously applied in the action to set aside the judgment, and his application has been refused, and the refusal affirmed by the Court of Appeal."

1. (1866) L.R. 16 Q.B.D. 315.

2. (1892) L.R. 2 Q.B.D. 633.

Lord Esher, M. R., observed at pages 636-637 :

"The decision (*Ex parte Lennox*[1]) is based upon the highest ground—*viz*., that in making a receiving order, the Court is not dealing simply between the petitioning creditor and the debtor, but it is interfering with the rights of his other creditors, who, if the order is made, will not be able to sue the debtor for their debts, and that the Court ought not to exercise this extraordinary power unless it is satisfied that there is a good debt due to the petitioning creditor. The existence of the judgment is no doubt, *prima facie* evidence of a debt ; but still the Court of Bankruptcy is entitled to enquire whether there really is a debt due to the petitioning creditor."

A debt to be entered in the schedule must therefore be a real debt. A judgment against a debtor which is sought to be relied upon in proving a debt does not necessarily establish the existence of a real debt for the judgment may have gone by default, it may have gone by consent or it may have been procured for any other reason. In a proceeding relating to proof of debts the question which arises being not one between the insolvent and the proving creditor alone, the rights of other creditors of the insolvent have of necessity to be considered. Even if for some reason the debtor himself is estopped from denying the debt there will be no estoppel against the Insolvency Court.

The Court therefore in each case has jurisdiction to investigate whether there is a real debt : whether production of a judgment or a negotiable instrument or other evidence may be regarded as sufficient to regard the debt as proved is a matter for the Insolvency Court to decide. The question is not to be adjudged in the light of any estoppel which may operate against the insolvent or of any presumption. The Court in a given case may rely merely upon a judgment or a negotiable or other instrument, and admit the debt to the schedule not because there is an estoppel against the Receiver or the other creditors, or presumption of law in favour of the evidence produced, but because in its view in the light of the circumstances no further enquiry beyond proof of the judgment or negotiable instrument or other document evidencing the debt and proof of non-satisfaction of the debt since the date thereof is sufficient. The Court has power, however, to insist upon proof of the debt apart from the judgment or the negotiable or other instrument. The reason is that the Insolvency Court with a view to effectively distribute the estate of the insolvent among the creditors is entitled to go behind outward forms of transactions and to ascertain the truth of the debts sought to be proved, and the estoppel to which the insolvent may have subjected himself will not prevail against the Receiver. Whether the power should be exercised in the case of a judgment debt in a given case depends upon the discretion of the Court which has to be exercised on sound judicial principles. It is true that the Court ordinarily does not go behind a judgment against the debtor, on a bare suggestion by the debtor that the debt which is merged in the judgment did not exist or was bad. There must undoubtedly be circumstances *prima facie* justifying an enquiry. There must appear something that the judgment was procured by fraud or collusion, or that there has been miscarriage of justice. But a mere irregularity or error in form will not be a sufficient reason for going behind the judgment.

When a debt secured by a promissory note is sought to be proved, the Insolvency Court must enquire into the reality, and the quantum of consideration. What shape this enquiry may take will depend upon the circumstances of the case. In a given case the Insolvency Court may regard an affidavit setting out the particulars of the debt, and affirming execution of the promissory note by the insolvent, and asserting non-satisfaction of the debt, as sufficient. In other cases, the Court may enter upon a fuller enquiry which the circumstances of the case may demand. But in all cases of proof of debts under section 33 the burden is upon the creditor. That burden may be discharged by the affidavit of the creditor viewed in the light of a presumption which the Court may raise under section 114 of the Evidence Act that a bill of exchange accepted or endorsed, was for good consideration. If that be the true effect of section 33 of the Provincial Insolvency Act, and we think both on principle and authority that is the true effect, of necessity the presumption under section 118 of the Negotiable Instruments Act that every negotiable instrument was made or drawn for consideration cannot avail against the Receiver of the

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1. (1866) L.R. 16 Q.B.D. 315.

estate of the insolvent. It is true that section 118 of the Negotiable Instruments Act, unlike section 119 to section 122 which occur in Chapter XIII, does not refer to a proceeding in suit where the various presumptions directed have to be raised. The section is undoubtedly in terms general. But there is no reason to suppose that it was intended to apply to a proceeding which is not in the nature of a civil dispute between the parties to the negotiable instrument or their privies. The Negotiable Instruments Act is intended to codify the law merchant relating to dealings concerning negotiable instruments. The presumptions which are raised under section 118 do undoubtedly set out special rules of evidence relating to negotiable instruments, but in our opinion the nature of the presumptions from their very nature operate in favour of or against the parties to the negotiable instrument or their privies and cannot generally apply to persons who do not claim under the parties to the instrument. In *Anumolus Narayana Rao* v. *Ghattaraju Venkatappayya*[1] it was observed by Varadachariar, J., that a suit on a promissory note instituted against an undivided sons of a Hindu promisor governed by the *Mitakshara* law after the latter's death cannot be regarded as one against the heirs or representatives of the promisor, because it only seeks to enforce the Hindu law theory of pious obligation of the sons in respect of the property which the sons have taken by survivorship. The pious obligation can arise only on the assumption of the existence of a debt due by the father and in such a case the onus of proving the existence of the debt must *prima facie* be laid on the creditor who can call in aid the presumption permissible under the general law of evidence namely, section 114 of the Indian Evidence Act and not the presumption under section 118 (*a*) of the Negotiable Instruments Act. The learned Judge observed:

> "Though this section is not, like sections 119 to 122, limited in terms to a suit upon the instrument, it seems only reasonable to hold that the special rules of evidence laid down in section 118 must have been intended to apply only as between the parties to the instrument or those claiming under them. In other cases the presumption can only be in the terms enacted in section 114 of the Evidence Act (*vide Illus. c*) wihch by the use of the expression 'may presume' leaves it to the Court to apply the presumption or not according to circumstances."

Section 114 of the Indian Evidence Act authorises the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Under the third *Illustration* of section 114 the Court may presume that a bill of exchange accepted or endorsed was accepted for good consideration. But the section provides, that the Court shall also have regard to other material facts in considering whether the maxim does or does not apply in the particular case before it, it is therefore open to the Court to consider in its proper setting, the fact that the drawer of a bill of exchange was a man of business, and the acceptor was a young and ignorant person completely under the former's influence. This is one illustrative fact which the Court may consider in raising the presumption. There may be other circumstances which may also justify the Court in declining to raise the presumption. Mr. Pathak for the respondents urged that the Indian Evidence Act was enacted in 1872 and the Negotiable Instruments Act having been enacted in 1881, and as the two provisions conflict or overlap, section 118 of the Negotiable Instruments Act must supersede section 114 of the Evidence Act. We are unable to accept that contention. Undoubtedly section 114 of the Evidence Act is a general provision which enables the Court to presume, though not obliged to do so, that a bill of exchange or a promissory note was founded on a good consideration. Section 118 of the Negotiable Instruments Act, however, enacts a special rule of evidence which operates between parties to the instrument or persons claiming under them in a suit or proceeding relating to the bill of exchange and does not affect the rule contained in section 114 of the Evidence Act, in cases not falling within section 118 of the Negotiable Instruments Act.

In our view the High Court was in error in holding that a statutory presumption of consideration arose in favour of the respondents in the proceeding under section

1. (1937) 1 M.L.J. 543 : I.L.R. (1937) Mad. 299.

33 for settlement of the schedule of creditors, and the Receiver exercising power under section 80 of the Act was bound to admit the debts in the schedule if the insolvent or the other creditors failed to displace that presumption.

The appeal must therefore be allowed, the order of the High Court set aside, and the order of the District Court restored, with costs in this Court.

K.S. *Appeal allowed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. N. WANCHOO AND J. R. MUDHOLKAR, JJ.

Mugneeram Bangur & Co. (P.), Ltd. .. *Appellant* *

v.

Gurbachan Singh .. *Respondent.*

Contract Act (IX of 1872), section 56—Contract for sale of land—Requisition of the land under Defence of India Rules—If operates as discharge.

If the performance of the contract is rendered unlawful either for a determinate period of time or for an indeterminate period of time the contract would not stand discharged unless the ban on its performance existed on the day or during the time within which it has to be performed. Where the parties to a contract for sale of land to be executed after the vendor had constructed the roads and drains is completely silent as to the time within which the roads and drains were to be completed, time was in no sense the essence of the contract and the requisitioning of the land under the Defence of India Rules will not operate as a discharge of the contract.

Appeal by Special Leave from the Judgment and Decree dated the 28th January, 1959 of the Calcutta High Court from Original Decree No. 226 of 1952.

B. Sen, Senior Advocate (*S. N. Mukherjee*, Advocate, with him), for Appellant.

Hem Chandra Dhar, S. S. Khanduja and *Ganpat Rai*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Mudholkar, J.—This appeal, like *Satyabrata Ghose* v. *Mugneeram Bangur & Co., and another*[1] relates to the effect of requisitioning orders made by the Government during the last war under which they took possession of land belonging to the appellant company which had been divided into building plots by them in pursuance of what is known as the Lake Colony Scheme, by constructing roads and drains. The plaintiff-respondent was one of the various persons who had entered into contracts with the company for purchase of plots, in pursuance of the public offers made by the company. This he did by addressing the following letter to the company and paying Rs. 202 by way of earnest money :

" To

Mugneeram Bangur & Company Land Department,
Russa Road, South, Tollygunge, Calcutta,
No. 499, Phone : South 135.

Through Babu—

Re : Plots Nos. New Nos. 245 and 246 on 30 feet road in the premises No. Lake Colony Scheme No. 1, Northern Block.

Area measuring—10 ks. × ch. × sqr. ft. more or less.

Dear Sir,

I am willing to purchase the above plot of land from you at the average rate of Rs. 1,075 (Rupees one thousand and seventy-five only) per katta irrespective of the condition of the soil and I am ready to deposit Rs. 202 of the actual value as an earnest money at once. I undertake to complete the transaction within one month from the date on (?) (of) completion of road on payment of the balance of the consideration money and time must be deemed as essence of the contract. If I fail to do so within the said period the earnest money deposited by me will be forfeited and you will be free to re-

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*C.A. No. 180 of 1962. 16th December, 1964.

1. (1954) S.C.J. 1 : (1954) 1 M.L.J. 41 : (1954) S.C.R. 310.

sell the land and I shall be liable for all damages that may result thereby. I also agree to sign a formal agreement in the form required by you if you so desire.

Yours faithfully,
Name: Gurbachan Singh,
Address: 48/1, Chakraberia Road, North.

Dated the .... 19 ....
Witness: (Illegible).
Address ....

N.B.—I agree to pay half of the value at the time of registration of the deeds and the balance within 6 years bearing interest at the rate of 6 per cent. per annum with half-yearly rests and the said plots Nos. 245 and 246 purchased by me shall remain charged for the payment of the balance of the purchase money in manner as aforesaid and the necessary security deed charged should be executed and registered by me at my own cost.

Name: Gurbachan Singh
Address: ....
Witness. (Illegible)
4, Baktiar Shah Road, Tollygunge.

The letter does not bear any date; but probably it was written on 14th May, 1941 which is the date on which the company issued a receipt in his favour. Different portions of the land covered by the scheme were requisitioned by Government between 12th November, 1941 and 25th July, 1944. The plots which the respondents had contracted to purchase are said to form part of the land which was requisitioned by virtue of an order made by the Government on 18th February, 1944.

According to the company, on 24th December, 1943, a circular notice was sent to all those persons who had entered into contracts for purchase of plots from them stating that a considerable portion of the land comprised in the Lake Colony Scheme area had been requisitioned under the Defence of India Rules and was taken into possession by the Government. It was not possible to say how long the Government would continue to be in possession and, therefore, it was not possible for the company to carry on the work of the construction of roads and drains during the continuance of the war and possibly for many years even after the termination of the war. The circular then proceeded to state as follows:—

"In these circumstances we have decided to treat the agreement as cancelled and give you the option of taking of the refund of the earnest money deposited by you within one month from the receipt of this letter.

In the event of your refusal to treat the contract as cancelled, we are offering you, in the alternative, to complete the registration of the conveyance of the sale deed within one month from the receipt of this letter. In such a case you have to take the lands as it is now, the road and drain will be made by us as soon as circumstance will permit after the termination of the war.

If you do not exercise your option in any of the two ways mentioned above the agreement will be deemed to have been cancelled and your earnest money forfeited."

On 8th May, 1946 the respondent's Attorneys, acting under instructions, wrote to the company saying that the respondent had learnt from the company's office that the Government would be de-requisitioning lands taken over by them and inquiring of the company as to when it would be possible for the company to deliver possession of the plots to the respondent. In reply to that letter the company wrote on 29th May, 1946, drawing his attention to their circular letter and said that by reason of the failure of the respondent to exercise the options given by them therein the agreement stood cancelled and the earnest money had been forfeited. On 13th June, 1946, the respondent's Attorneys expressed surprise at the company's reply and stated that the respondent had not received the circular referred to in the company's reply and ended by saying as follows:

"That my said client, therefore, now hereby asks you as to when you are going to complete the roads, so that he may do the needful for completion of the conveyances within one month from such date of completion of the roads.

That my said client hereby calls upon you to intimate to him within seven days from date the expected exact date of completion of roads to enable him to complete the conveyance as per agreement, failing which we will be forced to take legal steps against you in the matter as he may be advised in the matter, without further reference which please note.".

Apparently the company did nothing with the result that the present suit was instituted by the respondent on 8th August, 1946 in the Court of the Second Subordinate Judge at Alipore. The company resisted the suit on various grounds but only two are material for the purpose of this appeal because Mr. Sen has confined his argument only to those matters. One is that the contract has been discharged by reason of frustration and the second is that the suit was premature. The suit was decreed and that decree was upheld by the High Court in appeal. A certificate that the case was fit for appeal to this Court having been refused by the High Court the company sought and obtained from this Court Special Leave to appeal. That is how the matter comes up before us.

This case would really appear to be covered by the decision of this Court to which we have referred at the outset. Mr. Sen, however, points out that the question as to whether the contract could be said to have been discharged because of the fact that its performance was rendered unlawful as a result of the requisitioning orders made by the Government which was sought to be raised before this Court in that case was not permitted to be raised by it and has been left open. He admits that certain observations made by this Court towards the concluding portion of the judgment would indicate that this Court was not prepared to accept the contention sought to be urged before it. But, Mr. Sen says that as the contention was not permitted to be raised, the observations of this Court could be said to have been made merely in passing and at best be regarded as a tentative expression of its views. We think Mr. Sen is right in the sense that the question has been actually left open by this Court. But even so, we will have to consider whether the grounds upon which the previous decision rests would not be relevant for consideration in connection with the argument advanced by Mr. Sen.

In so far as discharge of contract by reason of frustration is concerned there is no question of implying a term in the contract, a term fundamental for its performance, as is done by the Courts in England because we have here the provisions of section 56 as well as those of section 32 of the Contract Act. This is what was held by this Court in the earlier case and that decision binds us. No doubt, a contract can be frustrated either because of supervening impossibility of performance or because performance has become unlawful by reason of circumstances for which neither of the parties was responsible. In the earlier case this Court has held that where the performance of an essential condition of the contract has become impossible due to supervening circumstances the contract would be discharged. This Court has further held that the impossibility need not be an absolute one but it is sufficient if further performance becomes impracticable by some cause for which neither of the parties was responsible. It, however, held that the mere fact that the performance of an essential term of the contract, that is to say, of undertaking development of the area under the scheme could not be undertaken because the land had been requisitioned, did not have the effect of frustrating the contract. For though the term regarding development was an essential term of the contract, the requisitioning of the land was only for a temporary period. Further the parties had deliberately not placed any time-limit within which roads and drain had to be made apparently because they were aware of the difficulties in carrying on the work on account of scarcity of materials and the various restrictions which the Government had placed on such activities. This Court also pointed out:

"Another important thing that requires notice in this connection is that the war was already on, when the parties entered into the contract. Requisition orders for taking temporary possession of lands for war purposes were normal events during this period." (pp. 326-327.)

Though these observations were made while dealing with the argument that the contract has been frustrated by reason of impossibility of performance they would not be wholly out of place while considering the argument based upon the ground that continued performance of the contract has been renderred unlawful.

What section 56 speaks of is a contract, the performance of which has become unlawful. Now, it is true that no order was made under the Defence of India Rules prohibiting the company from carrying on the work of construction of roads

and drains. The actual order served upon the company, among other things, provides :

"The owner/occupier of the said land :

(a) shall place the said land at the disposal and under the control of the Military Estates Officer, Bengal Circle, on and from the 14th November, 1941 at 1 P.M. Bengal time until six months after the termination of the present war unless relinquished earlier."

In consequence of this order the company lost possession of the land and automatically lost access thereto. Without getting on to the land the company could not carry out its obligation to the purchasers of constructing the roads and drains. If, in disobedience of this order, the company's servants, agent's or contractors were to carry on the work of construction of the roads and drains by entering on the land of which the possession was with the Government, they would have been liable to punishment under sub-rule (7) of rule 75 (*a*) of the Defence of India Rules and also the company. We were informed that the land was used by the Government for military purposes. It is, therefore, possible that the land might have been declared as a protected place under rule 7 of the Defence of India Rules. Even, however, without such a declaration, we agree with Mr. Sen that it would not have been possible for the company, its agents, servants or contractors to go on the land during the continuance in force of the order of requisition without being rendered liable at law.

Even so it is clear that all that had become unlawful was to construct roads and drains while the land was bound to be given up by the Government sometime or other and, therefore, in essence the activities which were rendered unlawful were not forbidden for all time but only temporarily. It may be that the duration of the embargo was uncertain but not permanent. It would, therefore be relevant to enquire whether a contract could properly be held to be frustrated because for a certain period of time its performance has become unlawful. According to Mr. Sen the moment it became unlawful for one of the parties to the contract to continue with the performance, the contract was discharged and in this connection he referred us to certain observations of *Lord Wright in Denny Mott and Dickson Ltd.* v. *James B. Fraser & Co. Ltd.*,[1] and certain other portions of the report. We put to him the question as to what would be the effect of a requisitioning, say, for a period of one month. Would that operate as discharge of the contract? To that his answer was in the negative and we think that the answer was right. The question, then would be : would it make any difference if unlawfulness would attach to the performance of the contract for an indeterminate period? In our judgment if time is of the essence of the contract or if time for performance is set out in the contract it may be that the contract would stand discharged even though its performance may have been rendered unlawful for an indeterminate time provided unlawfulness attached to the performance of the contract at the time when the contract ought to have been performed. Thus, where the performance of a contract had been rendered unlawful by reason of some subsequent event the contract would stand discharged but such discharge will take place not necessarily from the date on which the further performance was rendered unlawful, unless further performance was rendered unlawful for all time. If the performance of the contract is rendered unlawful either for a determinate period of time or for an indeterminate period of time the contract would not stand discharged unless the ban on its performance existed on the day or during the time in which it has to be performed. Here it is pointed out by Mr. Sen that the respondent had made time the essence of the contract but that only applies to the grant of conveyance after the completion of the roads and drains. As already pointed out, parties were wholly silent as to the time within which the roads and drains were to be completed. Therefore, in so far as this aspect of the contract is concerned time was in no sense made the essence of the contract. According to Mr. Sen, however, where the parties have failed to specify in the contract time within which it has to be performed section 46 of the Contract Act comes in and the parties may be presumed to have agreed that

1. L.R. (1944) A.C. 265, 274.

the contract will be performed within reasonable time. To that the answer would be the same as that given in the earlier case, that is, the parties when they entered into the contract, knew the prevailing circumstances and must have borne in mind the possibility that something like what actually happened may happen and, therefore, did not specify the time within which the land had to be developed. In other words, the parties intended to exclude from the computation of reasonable time such time as was taken up in procuring the necessary material which was not easy to obtain and such as may be taken up if the land were requisitioned by Government. Thus, in our view it cannot be said that because of the requisitioning orders which had the effect of making the entry by or on behalf of the company on the land illegal during the subsistence of the period of requisitioning the contract stood discharged.

Then remains the other point argued by Mr. Sen. He said that the suit for specific performance was premature because under the agreement the respondent did not get a right to obtain a sale deed till after the development of the land comprised in the scheme was completed. That is perfectly true. But the fact remains that this work has been completed when the appeal was heard by the High Court. The Court would in such a case be justified in taking notice of subsequent events in moulding its relief accordingly.

In our judgment the Courts below were right in upholding the respondent's claim. The appeal is dismissed with costs.

K.S. *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, K. N. WANCHOO, M. HIDAYATULLAH, J. C. SHAH AND S. M. SIKRI, JJ.

Md. Ayub Khan .. *Appellant* *

v.

The Commissioner of Police, Madras and others .. *Respondents*

Union of India .. *Intervener.*

Citizenship Act (LVII of 1955), section 9 and Citizenship Rules, Rule 30—Determination of question whether a citizen has lost his citizenship by reason of obtaining passport from foreign country—Nature of inquiry and necessity to give opportunity to citizen concerned to prove his case that he did not obtain the passport voluntarily.

Section 9 of the Citizenship Act and paragraph 3 of Schedule III of the Citizenship Rules are valid. *Izhar Ahmad Khan* v. *Union of India*, (1962) Supp. 3 S.C.R. 235 and *Government of Andhra Pradesh* v. *Syed Mohd. Khan*, (1962) Supp. 3 S.C.R. 288, reaffirmed.

Where in the inquiry contemplated by rule 30 of the Citizenship Rules, no opportunity was afforded to the appellant to prove his case that he had not obtained the passport voluntarily from the High Commissioner of Pakistan (and therefore had not lost his citizenship of India) the order is not valid. Reasonable opportunity must be afforded to the citizen to convince the authority that what is alleged against him is not true. What the scope and extent of the enquiry to be made by the authority on a plea raised by the citizen concerned should be, depends upon the circumstances of each case.

If voluntary acquisition of citizenship of another country determines Indian Citizenship within the meaning of section 9 (1) of the Citizenship Act and by virtue of paragraph 3 of Schedule III of the Citizenship Rules a conclusive presumption of *voluntary acquisition* of citizenship is to be raised from the obtaining of a passport from the Government of any other country, it would be implicit that the obtaining of a passport was the result of the exercise of free volition by the citizen.

Section 9 (2) of the Citizenship Act read with rule 30 of the Citizenship Rules confers the power to determine whether Indian Citizenship is terminated upon the specified authority, and in exercising that power the authority is guided by the statutory rules of evidence. It would be impossible to hold that termination of Indian Citizenship depends upon action of a foreign country in issuing the passport.

The decision of the Government without giving an opportunity to the appellant to prove his case that he had been compelled by the Police to obtain a passport from the High Commissioner of Pakistan cannot sustain the order of deportation of the appellant under the Foreigners Act.

Appeal from the Judgment and Order dated 17th November, 1959, of the Madras High Court in Writ Appeal No. 46 of 1959.

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* C.A. No. 250 of 1964. 5th February, 1965.

P. Ram Reddy and *A. V. V. Nair*, Advocates, for Appellant.

A. Ranganadham Chetty, Senior Advocate, (*A. V. Rangam*, Advocate, with him), for Respondents.

S. V. Gupte, Solicitor-General of India (*R. H. Dhebar*, Advocate, with him), for Intervener.

The Judgment of the Court was delivered by

Shah, J.—The appellant Mohd. Ayub Khan petitioned the High Court of Madras for a writ of *mandamus* restraining the Commissioner of Police, Madras, from taking action pursuant to the order of the Government of Madras, Home Department, No. 83546, dated 28th May, 1958, and from interfering with the appellant's rights as a citizen of India. The petition was dismissed by Balakrishna Ayyar, J., and the order was confirmed in appeal by a Division Bench of the High Court. With certificate granted by the High Court, the appellant has appealed to this Court.

The appellant, who claims that he had acquired the status of an Indian citizen on the commencement of the Constitution as a person who had been ordinarily resident in the territory of India for not less than five years immediately preceding that date, was served with a notice dated 17th July, 1957, informing him that as he had obtained Pakistan Passport No. 071377, dated 1st April, 1953, he should leave India within one month from the date of service of the notice, and in default of compliance he would be prosecuted and deported from India under the Foreigners Act, 1946 as amended by the Foreigners Law (Amendment) Act, 1957. On 19th August, 1957, the appellant applied to the Collector of Madras for registration as a citizen of India. Later he applied to the Central Government under section 9 (2) of the Citizenship Act, 1955 to determine the question whether he continued to remain a citizen of India, and prayed that he may be given an opportunity to produce all " necessary evidence in support of his claim as regards Indian citizenship." Without affording him that opportunity, however, the Government of India by order dated 7th May, 1958, rejected the application of the appellant under section 9 of the Citizenship Act.

In support of his petition before the High Court for issue of a writ of *mandamus*, the appellant urged that section 9 of the Citizenship Act, 1955 was *ultra vires* the Parliament and clause (3) of Schedule III to the Citizenship Rules was also *ultra vires* the Central Government, and that in any event rule 30 of the Citizenship Rules contemplated a quasi-judicial inquiry in which an opportunity must be given to the party sought to be affected, to make a representation and to adduce evidence to show that the acquisition of a passport from the High Commissioner for Pakistan was not voluntary. Balakrishna Ayyar, J., rejected these contentions. In dealing with the question whether the order of the Central Government was unenforceable because opportunity to prove the appellant's case that he had not voluntarily renounced Indian citizenship, the learned Judge observed that the appellant "had not indicated on what points he intended to lead evidence and what kind of evidence he intended to adduce."

In appeal the High Court held that the appellant " had in fact made a declaration on the basis of which the passport was obtained and the allegations made by him did not even imply that he was forced to make a false declaration." In the view of the High Court section 9 lays " down an objective test and when the individual had brought himself within it, the law determines the legal consequences of the situation, independently of his intent or understanding ", and therefore there was no scope for an enquiry of the nature claimed by the appellant.

Before dealing with the arguments raised by Counsel for the appellant in this appeal, certain constitutional and legislative provisions which have a bearing thereon may be set out. Part II of the Constitution deals with the topic of citizenship. By Article 5 a person who at the commencement of the Constitution had his domicile in the territory of India and who was born in the territory of India; or either of whose parents was born in the territory of India; or who had been ordinarily resident in the territory of India for not less than five years immediately preceding

such commencement was deemed a citizen of India. By virtue of clause (3) of Article 1 the territory of India is comprised of the States, the Union Territories and and such other territories as may be acquired. Article 6 deals with the acquisition of rights of citizenship of persons who have migrated to India from Pakistan, and Article 7 deals with the rights of citizenship of migrants to Pakistan. Article 8 deals with the rights of citizenship of certain persons of Indian origin residing outside India. Article 9 provides :

> " No person shall be a citizen of India by virtue of Article 5 or be deemed to be a citizen of India by virtue of Article 6 or Article 8, if he has voluntarily acquired the citizenship of any foreign State."

Article 10 provides that every person who is or is deemed to be a citizen of India under any of the foregoing provisions shall, subject to the provisions of any law that may be made by Parliament, continue to be such citizen. By Article 11 Parliament is authorised to make provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship. Article 367, clause (3) defined a " foreign State " as any State other than India, but the President was by the proviso thereto authorised, subject to the provisions of any law made by Parliament, to declare by order any State not to be a foreign State for such purposes as may be specified in the order. By a declaration made under the Constitution (Declaration as to Foreign States) Order, 1950, it was declared that, subject to the provisions of any law made by Parliament, every country within the Commonwealth was not to be a foreign State for the purpose of Article 9 of the Constitution. Pakistan could not therefore be regarded as a foreign State, until legislation was enacted by Parliament to the contrary. In 1955 the Parliament enacted the Citizenship Act LVII of 1955 to provide for the acquisition and termination of Indian citizenship. The Act made detailed provisions for acquisition of citizenship by birth, by descent, by registration, by naturalisation and by incorporation of territory in sections 3 to 7 of the Act. In sections 8, 9 and 10 provision was made for renunciation, termination and deprivation of citizenship. By section 9 it was enacted that :

> " (1) Any citizen of India who by naturalisation, registration or otherwise voluntarily acquires, or has at any time between the 26th January, 1950 and the commencement of this Act voluntarily acquired, the citizenship of another country shall, upon such acquisition or, as the case may be such commencement cease to be a citizen of India :
>
> Provided that nothing in this sub-section shall apply to a citizen of India who, during any war in which India may be engaged, voluntarily acquires the citizenship of another country, until the Central Government otherwise directs.
>
> (2) If any question arises as to whether, when or how any person has acquired the citizenship of another country, it shall be determined by such authority, in such manner, and having regard to such rules of evidence, as may be prescribed in this behalf."

By section 18 (1) the Central Government was authorised to make Rules, *inter alia*, for setting up the authority to determine the question of acquisition of citizenship of another country, and the procedure to be followed by such authority and rules of evidence relating to such cases. In exercise of the authority under section 18 (1) the Citizenship Rules, 1956 were framed by the Central Government and they came into force on 7th July, 1956. By rule 30, it was provided :

> " If any question arises as to whether, when or how any person has acquired the citizenship of another country, the authority to determine such question shall, for the purposes of section 9 (2), be the Central Government.
>
> (2) The Central Government shall in determining any such question have due regard to the rules of evidence specified in Schedule III."

Schedule III set out the rules referred to inrule 30 (2). Clauses (1), (2) and (3) are material :

> " (1) Where it appears to the Central Government that a citizen of India has voluntarily acquired the citizenship of any other country, it may require him to prove within such period as may be fixed by it in this behalf, that he has not voluntarily acquired the citizenship of that country and the burden of proving that he has not so acquired such citizenship shall be on him.
>
> (2) For the purpose of determining any question relating to the acquisition by an Indian citizen of the citizenship of any other country, the Central Government may make such reference as it thinks fit in respect of that question or of any matter relating thereto, to its Embassy in that country or to the

Government of that country and act on any report or information received in pursuance of such reference.

(3) The fact that a citizen of India has obtained on any date a passport from the Government of any other country shall be conclusive proof of his having voluntarily acquired the citizenship of that country before that date."

Acquisition of citizenship at the commencement of the Constitution was governed by Articles 5, 6 and 7. If however, a person had voluntarily acquired citizenship of a foreign State he could not claim the status of a citizen under Article 5, and he could not be deemed to be a citizen by virtue of Article 6 or Article 8. Article 10 continues, subject to the provisions of any law to be made by Parliament, the right of citizenship acquired or deemed to be acquired under the foregoing Articles. Power of Parliament to enact legislation to make provision with respect to the acquisition and termination of citizenship is as a matter of abundant caution affirmed by Article 11. The Parliament by section 9 of the Citizenship Act, 1955 legislated in regard to determination of citizenship and provided, *inter alia*, that a person who has voluntarily acquired since 26th January, 1950, or acquires after the commencement of the Act citizenship of another country, shall cease to be a citizen of India, and that if any question arises as to whether citizenship of another country has been acquired by a person, the question must be determined by the authority, in such manner and having regard to such rules of evidence, as may be prescribed in that behalf.

This Court has pronounced upon the legislative competence of the Parliament to enact section 9 of the Citizenship Act, 1955 in *Izhar Ahmad Khan* v. *Union of India*[1]. In the same case challenge to the validity of rule 3 of Schedule III to the Rules framed under the Citizenship Act, 1955 was also negatived. Mr. Ram Reddy for the appellant contended that as certain important aspects of the plea of invalidity were not presented before the Court at the hearing of *Izhar Ahmad Khan's case*[1], we should again proceed to consider the challenge to the validity of rule 3 of Schedule III and section 9 of the Citizenship Act limited to those arguments. We are unable, however, to countenance the submission. This Court has held on the arguments presented before the Court in *Izhar Ahmad Khan's case*[1], that section 9 of the Act was validly enacted by the Parliament and that rule 3 of Schedule III was competently made by the Central Government in exercise of the powers conferred by section 18 of the Citizenship Act. Assuming that certain aspects of the question were not brought to the notice of the Court, we see no grounds for entering upon re-examination of the question. It may be pointed out that the judgment of the Court in *Izhar Ahmad Khan's case*[1], was followed by this Court in the *Government of Andhra Pradesh* v. *Syed Mohd. Khan*[2].

The question which survives for determination is whether the appellant can challenge the validity of the order of the Commissioner of Police pursuant to the order made by the Central Government under section 9 (2) of the Act on the plea that he had not "voluntarily obtained" a passport from the High Commissioner for Pakistan in India. In the petition as originally filed, the Union of India was not impleaded as a party-respondent and on the state of authorities then in force the appellant could not implead the Union of India as a party-respondent to the petition filed by him in the High Court of Madras. When this appeal was heard on 7th December, 1964, notice was issued calling upon the Union to produce the orders and proceedings under section 9 (2) of the Citizenship Act relating to the case of the appellant. Pursuant to the direction the relevant proceedings and order have been produced and an affidavit has been filed by the Under Secretary in the Ministry of Home Affairs. It is now common ground that in the inquiry contemplated by rule 30 of the Citizenship Rules, no opportunity was afforded to the appellant to prove his case that he had not obtained the passport voluntarily from the High Commissioner for Pakistan.

Section 9 (1) of the Citizenship Act provides for termination of citizenship of an Indian citizen if he has (subject to the proviso which is not material) by natura-

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1. (1962) Supp. 3 S.C.R. 235 : A.I.R. 1962 S.C. 1052.
2. (1963) 2 M.L.J. (S.C.) 62 : (1963) 2 S.C.J. 178 : (1963) 2 An.W.R. (S.C.) 62 : (1962) Supp. 3 S.C.R. 288 : A.I.R. 1962 S.C. 1778.

lisation, registration or otherwise, voluntarily acquired citizenship of another country. Subject to the exception in the proviso therefore naturalisation, registration or acquisition of citizenship of another country operates to terminate the citizenship of India. Acquisition of citizenship of another country to determine Indian citizenship must however be voluntary. By sub-section (2) provision is made for setting up an authority to determine the question where, when and how citizenship of another country has been acquired, and by rule 30 the Central Government is designated as the authority which is invested with power to determine the question in such manner, and having regard to such rules of evidence as may be prescribed. Provision for prescribing rules of evidence, having regard to which the question of acquisition of citizenship of another country has to be determined, clearly indicates that the order is not to be made on the mere satisfaction of the authority without enquiry, that the citizen concerned has obtained a passport of another country. The question as to whether when and how foreign citizenship has been acquired has to be determined having regard to the rules of evidence prescribed, and termination of Indian citizenship being the consequence of voluntary acquisition of foreign citizenship, the authority has also to determine that such latter citizenship has been voluntarily acquired. Determination of the question postulates an approach as in a quasi-judicial enquiry: the citizen concerned must be given due notice of the nature of the action which in the view of the authority involves termination of Indian citizenship, and reasonable opportunity must be afforded to the citizen to convince the authority that what is alleged against him is not true. What the scope and extent of the enquiry to be made by the authority on a plea raised by the citizen concerned should be, depends upon the circumstances of each case.

Paragraph 1 of Schedule III which raises a rebuttable presumption, when it appears to the Central Government that a citizen has voluntarily acquired foreign citizenship, casts the burden of proof upon the citizen to disprove such acquisition, and Paragraph 2 which authorises the Central Government to make enquiries for the purpose of determining the question raised, strongly support the view that the Central Government must arrive at a decision that the Indian citizen has voluntarily acquired foreign citizenship, before action can be taken against him on the footing that his citizenship is terminated. Paragraph 3 raises a conclusive presumption that a citizen of India who has obtained a passport from a foreign country on any date, has before that date voluntarily acquired citizenship of that other country. By the application of the rule in Paragraph 3 the authority must regard obtaining of a foreign passport on a particular date as conclusive proof that the Indian citizen has voluntarily acquired citizenship of another country before that date. But obtaining of a passport of a foreign country cannot in all cases merely mean receiving the passport. If a plea is raised by the citizen that he had not *voluntarily* obtained the passport, the citizen must be afforded an opportunity to prove that fact. Cases may be visualized in which on account of force a person may be compelled or on account of fraud or misrepresentation he may be induced, without any intention of renunciation of his Indian citizenship, to obtain a passport from a foreign country. It would be difficult to say that such a passport is one which has been "obtained" within the meaning of Paragraph 3 of Schedule III and that a conclusive presumption must arise that he has acquired voluntarily citizenship of that country.

We are not concerned in this case with the truth or otherwise of the plea raised by the appellant in his petition before the High Court that he was compelled to obtain the passport from the High Commissioner for Pakistan. Balakrishna Ayyar, J., observed that the plea of the appellant was not *bona fide*. But it is not the function of the Courts to determine the question whether the plea raised is true or not: it is for the authority invested with power under section 9 (2) to determine that question if it is raised. The High Court in appeal was of the view that section 9 laid down an objective test and once it was found that the passport was obtained in fact by an Indian citizen from another country, the law determined the legal consequences of that conduct and no question of his "intent or understanding arose". We are unable to agree with that view. If voluntary acquisition of citizenship of another country determines Indian citizenship within the meaning of section 9 (1)

and by virtue of Paragraph 3 of Schedule III of the Citizenship Rules a conclusive presumption of voluntary acquisition of citizenship is to be raised from the obtaining of a passport from the Government of any other country, it would be implicit that the obtaining of a passport was the result of the exercise of free volition by the citizen. This view is strengthened by the scheme of section 9 (2) read with rule 30 which contemplates an enquiry by an authority prescribed under sub-section (2) for determination of the question whether citizenship of another country had been acquired by an Indian citizen.

Counsel for the State of Madras submitted that the question whether the passport was voluntarily obtained must be decided by the foreign country, representative of which issues the passport, and mere issue of a foreign passport must always be regarded as decisive of the question that the passport was voluntarily obtained. But section 9 (2) read with rule 30 confers the power to determine whether Indian citizenship is terminated upon the specified authority, and in exercising that power the authority is guided by the statutory rules of evidence. It would be impossible to hold that termination of Indian citizenship depends upon action of a foreign country in issuing the passport.

We are therefore of the view that the High Court was in error in holding that the decision of the Government of India without giving an opportunity to the appellant to prove his case that he had been compelled by the police to obtain a passport from the High Commissioner for Pakistan will sustain the order of deportation against the appellant. It will of course be open to the Central Government to determine whether the appellant has lost the citizenship of India by voluntarily acquiring the citizenship of Pakistan by obtaining a passport from the High Commissioner for Pakistan, or in any other manner. But the determination must be made in accordance with law.

The appeal is allowed, and it is ordered that the order of deportation passed by the Commissioner of Police, Madras shall not be enforced until the Central Government determines the status of the appellant according to law. No order as to costs.

K.S. ——— *Appeal allowed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, M. HIDAYATULLAH, J. C. SHAH AND S. M. SIKRI, JJ.

Sri-la Sri Subramania Desika Gnanasambanda Pandarasannidi... *Appellant**

v.

The State of Madras and another .. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), section 64(4)—Notification relating to temple continuing existing notification for further five years—If under quasi-judicial and not administrative powers—Necessity for observing rules of natural justice.

The issue of a notification under section 64 of the Madras Hindu Religious and Charitable Endowments Act (1951) has to be preceded by an enquiry and the trustee in question is entitled to urge his objections against issue of such a notifications and so, there can be no doubt that these proceedings are quasi-judicial and if a notification is issued under section 64 (3) without complying with the requirements of the provisions of section 63 and section 64 (1) and (2) it would be invalid.

While acting under section 64 (4) also the Government has to consider whether a case has been made out for cancellation of the notification or for extending it, and on each occasion where a decision has to be taken under section 64 (4), the process of reaching the decision is exactly similar to the process in reaching a decision under section 64 (3). All relevant facts in regard to the management of the endowment must be taken into account, and the question to be considered on each occasion would be whether or not supervision by the Executive Officer under notification is required in the interests of public good. Accordingly it was obligatory on the State as a matter of natural justice to give notice to the trustee concerned before a notification extending an existing notification is issued. Absence of such notice renders such notification invalid.

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* C.A. No. 560 of 1964. 10th February, 1965.

As the life of the notification will get statutory extended by reason of section 72 (7) of Madras Acts (XIX of 1951) and (XI of 1961), the High Court was in error in not quashing the notification on the ground that the impugned notification will last only for a short period thereafter. As under the statutory provisions the life of the notification gets extended, the only way in which the trustee would be able to show cause why the said notification should not be enforced in respect of his *kattalai* is to quash the notification.

Appeal from the Judgment and Order dated 11th August, 1961, of the Madras High Court in Writ Petition No. 295 of 1958.†

A. V. Viswanatha Sastri, Senior Advocate (*R. Thiagarajan*, Advocate for *R. Ganapathy Iyer*, Advocate, with him), for Appellant.

A. Ranganadham Chetty, Senior Advocate (*A. V. Rangam*, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

Gajendragadkar, C.J.—On 4th August, 1956, the Governor of Madras issued a notification in exercise of the powers conferred on him by sub-section (4) of section 64 of the Madras Hindu Religious and Charitable Endowments Act, 1951 (Madras Act XIX of 1951) directing that Notification No. 638, dated the 25th May, 1937, relating to Sri Thiyagarajaswami Temple, Tiruvarur, Nagapattinam Taluk, Tanjore District, be continued for a period of five years from 30th September, 1956. The earlier notification which was thus continued had itself been issued by the respondent State of Madras in exercise of the powers conferred on it by clause (*b*) of sub-section (5) of section 65-A of the Hindu Religious Endowments Act, 1926 (Madras Act II of 1927), declaring that the temple in question and the specific endowments attached thereto shall be subject to the provisions of Chapter VI-A of the said Act. In other words, the earlier notification which brought the temple of Sri Thiyagarajaswami at Tiruvarur under the purview of the earlier Madras Act has been extended by the notification issued on 4th August, 1956, for a further period of five years. By a writ petition filed by the appellant, Sri-la Sri Subramania Desika Gnanasambanda Pandarasannidi, Hereditary Trustee of the Rajan Kattalai of the temple in question, in the High Court of Madras the validity of this latter notification was challenged. The High Court has rejected the pleas raised by the appellant in support of his case that the impugned notification is invalid, and has dismissed the writ petition filed by him. It is against this order that the appellant has come to this Court with a certificate granted by the High Court. The controversy between the parties as it has been presented before us in appeal, really lies within a very narrow compass, but in order to appreciate the points raised for our decision, it is necessary to set out very briefly the background of the present litigation.

In the town of Tiruvarur in Thanjavur District, there is an ancient temple. The Presiding deity is Sri Thiyagarajaswami. A distinguishing feature of this temple is that apart from an allowance called 'the Mohini allowance,' there is no other property which can be treated as devoted for its general maintenance. A large number of specific endowments called 'Kattalais' with specific reference to special services in the temple, its festivities and several charities in glorification of the principal deity, have however been made in respect of this temple. It is said that there are 13 such Kattalais, the important amongst them being Rajan Kattalai, Ulthurai Kattalai, Abisheka Kattalai and Annadanam Kattalai. In respect of these Kattalais, large endowments have been made. According to the appellant, these endowments were made by the Indian Rulers who ruled Thanjavur before the establishment of the British Rule. It appears that the management of each one of these Kattalais is vested in a certain Trustee or Trustees hereditarily. The trusteeship of Rajan Kattalai vests in the head of the Dharmapuram Mutt in the Thanjavur district. The Dharmapuram Mutt itself has large endowments of lands in Thanjavur and Tirunelveli districts. The head of this Mutt is known as Pandarasannadhi and under his management there are about 27 temples. Having regard to the nature of the duties of the head of a Mutt of this importance

† (1962) 2 M.L.J. 67.

and magnitude, it is not possible for the Pandarasannadhi to supervise all the temples personally, and so, deputies are appointed on his behalf to supervise and look after the management of the various institutions. With regard to the services connected with the Rajan Kattalai in Sri Thiyagarajaswami temple at Thiruvarur, the head of Dharmapuram Mutt generally functions through a deputy known as, Kattalai Thambiran.

Ordinarily, a Kattalai is a specific endowment in respect of which it would be competent for the founder to prescribe the line of trustees for its management, and so, the property endowed for the performance of the Kattalai in question cannot be held to be transferred in trust to the trustee vesting the legal estate therein in him; such legal estate would vest in the deity itself. Thus, the position of the Kattalai trustee would normally be no more than that of a manager of a Hindu Religious Endowment. It, however, appears that Kattalais which are attached to Sri Thyagarajaswami temple at Thiruvarur have been treated as constituting a slightly different category by the Madras High Court in *Vythilinga Pandara Sannadhi* v. *Somasundara Mudaliar*[1] but with that aspect of the matter, we are not concerned in the present appeal. In practice, a scheme appears to have been evolved that in regard to the various services in the temple in respect of which Kattalais had been endowed, the management of the allotted properties vested in separate trustees and in that sense, all the trustees administering separate Kattalais could be said to constitute a kind of corporation in which the management of the temple properties vested, each one of its members being in charge of particular items of properties the proceeds of which would be utilised for the performance of a specific Kattalai.

In course of time, however, this practice did not work harmoniously and co-ordination between the duties of the various trustees worked unsatisfactorily, because more emphasis came to be placed on the individuality of the Kattalais and that led to anomalies in the actual administration of the said Kattalais. As a result, in 1910, a suit was filed under section 92 of the Code of Civil Procedure for the settlement of a scheme to manage the affairs of the temple in the Sub-Court at Thanjavur. A scheme was accordingly settled, and when the matter was taken in appeal, the High Court substantially confirmed the said scheme [vide *Gnana Sambanda* v. *Vaithilinga Mudaliar*[2]]. The scheme thus framed governed the management of the temple thereafter.

It appears that the affairs of the said temple again came up for consideration before the Madras High Court in *Ramanathan Chettiar* v. *Valayes Ammal*[3]. In that case, the High Court rejected the contention of one of the Kattalai trustees that subject to the performance of services, the endowments in question had to be treated as his property; the view taken by the High Court on this occasion was that all the Kattalais were appendages of the temple; though each Kattalaidar was a separate trustee, there was no question of private ownership.

In the year 1931, there was another suit under section 92 of the Code on the file of the District Court, East Thanjavur, for the modification of the scheme already framed. It was urged that certain defects in the scheme had been noticed in the actual working, and so, it was necessary to make some modifications. Accordingly, some modifications were made.

Meanwhile, the Madras Legislature passed the Madras Hindu Religious Endowments Act, 1927. The object of this Act was to provide for the proper administration and governance of certain Hindu Religious Endowments. The Act contemplated the supervision of these endowments through a statutory body called the Madras Hindu Religious Endowments Board. It divided the temples into "excepted and non-excepted temples". It also provided for the framing of a scheme for the management of the temples. This Act was amended by Madras Act IX of 1937. The result of the amendment was that Chapter VI-A was added to the Act of 1927. The provisions of this Chapter laid down that notwithstanding

1. (1894) I.L.R. 17 Mad. 199.
2. 18 L.W. No. 247.
3. 27 L.W. 33.

that a temple or specific endowment attached to a temple was governed by a scheme previously framed by the Board or settled by a Court, the Board if it were satisfied that the temple or endowment was being mismanaged and that in the interests of the administration of the temple or endowment it was necessary to take proceedings under the said Chapter, might " notify " the temple or endowment, and on the publication of such notification, the administration of the temple or endowment would go under the control of the Board notwithstanding the scheme which might have been framed already. On taking management of a notified temple or endowment, the Board was authorised to appoint an Executive Officer and define his duties. In consequence, such Executive Officer would virtually displace the trustee and would function under the control of the Endowment Board. The result of the notification in substance would be that the previously existing scheme would be suspended, and the management would vest in the Board.

Soon after this Act was passed, proceedings were commenced by the Board for the purpose of notifying the temple with which we are concerned in the present appeal, and the Kattalais attached thereto. The Trustees of the various Kattalais naturally opposed this step, but their objections were over-ruled, and on 25th May, 1937, a notification was issued. To this notification we have already referred. In pursuance of this notification, an Executive Officer was appointed by the Board on 12th July, 1937. On 30th July, 1937, the Board defined the powers of the Executive Officer and directed him to take charge and be in possession of the temple and the various Kattalais attached thereto. As a result of this order, the Executive Officer began to exercise all the powers and discharge all the functions of a trustee of a non-excepted temple, and that left very little powers in the hands of the trustees of the several Kattalais.

The Pandarasannadhi of the Dharmapuram Mutt who was then the hereditary Trustee of the Rajan Kattalai instituted C.S. No. 20 of 1938 in the Madras High Court for a declaration that the said notification was illegal and for setting aside the orders issued by the Board in pursuance of the said notification. It appears that the suit did not proceed to a trial, because the parties entered into a compromise. In substance, as a result of the compromise, the notification was maintained, but the possession of the Kattalai properties was restored to the Trustee who was to manage the same by a staff under his control, and had to keep accounts. Certain other provisions were made to safeguard the efficient management of the said trust, and the overall control and supervision of the Executive Officer was maintained. One of the clauses of the compromise, clause (*k*) expressly reserved to the Board liberty to re-define the powers and duties as specified above in case the Trustee commits any wilful breach of the above terms and conditions or is guilty of wilful neglect of the duties specified above, provided that the Board shall not do so except on notice to the trustee and after giving reasonable opportunity to him to be heard in his defence. This compromise decree was passed on 1st August, 1940, and since then, the administration of the Kattalai in question has been conducted in accordance with the terms of this decree.

After the Constitution came into force on 26th January, 1950, the Hindu Religious Endowments Act of 1927 was repealed and in its place Act XIX was substituted. This latter Act came into force on 30th September, 1951. Section 5 of this Act repealed the earlier Act of 1927. The Chapter relating to notification of temples and endowments was numbered as Chapter VI in the new Act. Section 64 of this new Act provided for the notification of a temple or a religious institution, and sub-section (4) laid down that every notification published under this section shall remain in force for a period of five years from the date of its publication ; but the Government may at any time on an application made to them cancel the notification. This section had made provisions for the notification of religious institutions after this new Act came into force. Section 103 (*c*) dealt with cases where notifications had been made under the previous enactment. That section provided that the notification published under section 65-A, sub-section (3) or sub-section (5) of the said Act and in force immediately before the commencement of the new Act

would be deemed to be a notification published under section 64 and would be in force for five years from the date of the commencement of the new Act (XIX of 1951).

In 1956, another Amending Act (IX of 1956) was passed. Section 2 of this Amending Act substituted a new sub-section in the place of section 64 (4). Under that provision, every notification published or deemed to be published under that section shall remain in force for a period of five years, but it may by notification be cancelled at any time or continued from time to time for a further period or periods not exceeding five years at a time as the Government may by notification in each case think fit to direct. As a consequence, section 103 (*c*) was also amended, and the words "and shall be in force for five years from the date of the commencement of this Act" were omitted. The result of this amendment was that the notification issued or deemed to be issued under the relevant provisions of the new Act would remain in force for a period of five years; it can be cancelled even before the said period expired, it can be continued after the expiry of the said period from time to time for such further period or periods as the Government may deem fit. We have already seen that the impugned notification has been issued under section 64 (4) of Act XIX of 1951. That, broadly stated, is the background of the present dispute between the appellant and the respondent State of Madras.

Two principal contentions were urged before the High Court by the appellant in support of his plea that the impugned notification is invalid. It was argued that the trusteeship of the Rajan Kattalai being hereditary in the head of the Dharmapuram Mutt, is a right of property under Article 19 (1) (*f*) of the Constitution, and since section 64 of the Act empowers the respondent State to take away that right of property in an arbitrary and capricious manner, that provision is constitutionally invalid. The second ground which was urged by the appellant was that the notification was issued without giving an opportunity to the appellant to show cause why the earlier notification should not be extended, and that made the notification invalid. The High Court has rejected the first contention, and we are really not called upon to consider that finding of the High Court in the present appeal, because the arguments urged before us covered a much narrower ground. In regard to the second contention raised by the appellant, the High Court has found in favour of the appellant that the proceedings authorised to be taken under section 64 (4) are in the nature of quasi-judicial proceedings, and the order which can be passed under the said provision is a quasi-judicial order; and so, the High Court conceded that before making such an order, it was necessary that the appellant should have been given an opportunity to be heard, for that is the requirement of natural justice; but the High Court thought that this specific point had not been taken by the appellant in his writ petition; that is why it was not inclined to allow it. The High Court refused to uphold the said point for the other reason that the impugned notification would soon expire on 30th September, 1961 and the Government would then have to consider whether it should be renewed or not, and the High Court thought that on that occasion, the Government would certainly hear the appellant before making up its mind on that issue. The judgment of the High Court was delivered on 11th August, 1961, and since the High Court thought that the impugned order can last only for a short period thereafter, it would serve no purpose to issue a writ quashing the said order on the ground that the principles of natural justice had not been complied with before passing it. Mr. Viswanatha Sastri for the appellant contends that both the grounds given by the High Court in support of its refusal to issue a writ are plainly erroneous, and we are satisfied that Mr. Sastri is right.

Before dealing with these grounds, however, it is necessary to consider the argument urged by Mr. Ranganathan Chetty on behalf of the respondent State that the High Court was in error in holding that the Order which has been passed under section 64 (4) is a quasi-judicial order and can be legitimately passed only after complying with the principles of natural justice. He argues that though the proceedings contemplated by section 63 and section 64 (1), (2) and (3) are quasi-judicial proceedings, the position in regard to the Order which can be passed under section 64 (4) is entirely different. He concedes that in making the first order notifying an

institution under section 64 (3), principles of natural justice have to be complied with ; in fact, express provisions have been made in that behalf, but he argues that the said principles do not apply where a notification validly issued under section 64 (3) has merely to be cancelled or extended under section 64 (4).

Chapter VI of Act XIX of 1951 which consist of sections 63 to 69, deals with the notification of religious institutions. Section 63 (1) in terms requires the issue of notice to show cause why a specific institution should not be notified. Sub-section (2) requires that the said notice shall state the reasons for the action proposed, and specify a reasonable time, not being less than one month from the date of the issue of the notice, for showing such cause. Sub-section (3) allows objections to be filed by the trustee ; and sub-section (4) requires that such objections shall be in writing and shall reach the Commissioner before the period specified. Having provided for the issue of a notice and for objections to be filed by the trustee, section 64 deals with the consideration of the objections, if any, and notification of institution. Section 64 (2) requires an enquiry to be held by the Commissioner at which the validity of the objections would have to be examined. Section 64 (3) authorises the Commissioner to make a report to the Government that in his opinion, the institution should be notified. Thereupon, the Government can issue the notification in question. Thus, it is plain that the issue of a notification has to be preceded by an enquiry, and the trustee in qustion is entitled to urge his objections against issue of such a notification ; and so, there can be no doubt that these proceedings are quasi-judicial, and if a notification is issued under section 64 (3) without complying with the requirements of the provisions of section 63 and section 64 (1) and (2), it would be invalid.

Mr. Chetty, however, contends that the position under section 64 (4) is entirely different. We have already quoted this provision. According to Mr. Chetty, the decision as to whether a notification should be cancelled before the period of five years is over, or continued from time to time, is a purely administrative decision. The Government is already in possession of the material relevant for the purpose of deciding the question. This material has been placed before the Government at the time of the enquiry which is held by the Commissioner under section 64 (2) before the initial notification is issued, and all that the Government has to do on subsequent occasions is to consider whether the said notification should be cancelled or continued. Such a decision needs no further enquiry and cannot be characterised as quasi-judicial. That is how Mr. Chetty supports the validity of the impugned notification, though it has been issued without giving notice to the appellant.

In support of this contention, he has relied upon the decision of this Court in *Shri Radeshyam Khare and another* v. *The State of Madhya Pradesh and others*[1]. In that case, it was held that section 33-A and 57 of the C.P. and Berar Municipalities Act, 1922, differed materially in their scope and effect and that the nature of the orders which can be passed under the two respective sections was not the same. That is why this Court found that whereas in taking action under section 53-A the State Government was required to act judicially, the same could not be said to be true about section 57. We do not see how this decision can afford any assistance to Mr. Chetty in support of his argument that section 64 (4) is entirely different in character from section 64 (3). It is plain that just as while acting under section 64 (3), the Government has ultimately to consider whether a case has been made out for the issue of a notification, so while acting under section 64 (4), Government has to consider whether a case has been made out for cancelling the notification or for extending it, and on each occasion, where a decision has to be taken under section 64 (4), the process of reaching the decision is exactly similar to the process in reaching a decision under section 64 (3). All relevant facts in regard to the management of the endowment must be taken into account, and the question to be considered on each occasion would be whether or not supervision by the Executive Officer under the notification is required in the interests of public good. It is difficult to see how the Government can legitimately and satisfactorily consider the question as to

1. (1959) 1 M.L.J. (S.C.) 5 : (1959) S.C.J. 6 : (1959) 1 An.W.R. (S.C.) 5 : 1959 S.C.R. 1440.

whether the notification should be cancelled, unless it hears the party asking for such cancellation. Similarly, it is difficult to understand how Government can legitimately and reasonably decide to extend the notification, unless it gives an opportunity to the Trustee to show cause why it should not be continued. One can imagine several circumstances which may arise after the issue of the first notification and which would help the Trustee to claim that the notification should either be cancelled or should not be extended. The nature of the order which can be passed under section 64 (4) and its effect on the rights of the trustee are exactly similar to the order which can be passed under section 64 (3). We are, therefore, satisfied that the High Court was right in holding that it was obligatory on the respondent State as a matter of natural justice to give notice to the appellant before the impugned notifiction was passed by it.

That takes us to the consideration of the question as to whether the two reasons given by the High Court in support of this decision are valid. The first reason, as we have already indicated, is that the High Court thought that the plea in question had not been raised by the appellant in his writ petition. This reason is no doubt, technically right in the sense that this plea was not mentioned in the first affidavit filed by the appellant in support of his petition; but in the affidavit-in-rejoinder filed by the appellant this plea has been expressly taken. This is not disputed by Mr. Chetty, and so, when the matter was argued before the High Court, the respondents had full notice of the fact that one of the grounds on which the appellant challenged the validity of the impugned order was that he had not been given a chance to show cause why the said notification should not be issued. We are, therefore, satisfied that the High Court was in error in assuming that the ground in question had not been taken at any stage by the appellant before the matter was argued before the High Court.

The second reason given by the High Court appears to be plainly erroneous. In assuming that the impugned Order would come to an end on 30th September, 1961, the High Court appears to have ignored the fact that before it delivered its judgment, a new Act had come into force (Madras Act XXII of 1959). This Act came into operation on 1st January, 1960. Section 72 (7) of this Act provides that any notification published under sub-section (1) or sub-section (3) of section 64 of Act XIX of 1951 before the commencement of this Act shall be as valid as if such notification had been published under this Act. This provision has again been subsequently amended by Act XL of 1961, and the amended provision is retrospectively brought into operation from 1st January, 1960. We do not propose to consider in this appeal the effect of these amendments, because it is enough for our purpose to state that as a result of the subsequent Act which had already come into force on the date when the High Court delivered its judgment, it is obvious that the impugned notification would not automatically come to an end on 30th September, 1961. This position is not disputed by Mr. Chetty and appears to be plain; so that the main reason which weighed with the High Court in not issuing a writ in favour of the appellant that the impugned notification would remain in operation for a very short period after it delivered its judgment, is found to be erroneous; and the impugned notification would continue in operation without the appellant getting an opportunity to show cause why it should not continue to be in operation. We are, therefore, satisfied that the High Court should have granted the prayer made by the appellant for the issue of an appropriate writ cancelling the impugned notification. Though the impugned notification has been issued in 1956 for five years, its life gets statutorily extended, and the only way in which the appellant would be able to show cause why the said notification should not be extended in respect of his Kattalai is to quash the said notification.

In the result, we allow the appeal, set aside the order passed by the High Court, and direct that an appropriate writ or order be issued quashing the notification issued by the respondent State on 4th August, 1956. The appellant would be entitled to his costs throughout.

K.S. — *Appeal allowed.*

THE SUPREME COURT OF INDIA.

PRESENT:—K. SUBBA RAO, RAGHUBAR DAYAL AND R. S. BACHAWAT, JJ.

A.D. Partha Sarathy .. *Petitioner**

v.

State of Andhra Pradesh .. *Respondent.*

Limitation Act (*XXXVI of* 1963), *Article* 133 (*b*)—*Limitation for petition to Supreme Court for Special Leave to appeal—Computation—Time taken for obtaining copy of judgment complained of and decree, sentence or order appealed from—How far to be excluded—Section* 12 (2) *of the Limitation Act—Scope.*

Supreme Court Rules, Order 13, *rule* 1 (*as substituted in* 1964)—*Applicability.*

Under Article 133 (*b*) of the Limitation Act (XXXVI of 1963) Special Leave to appeal to the Supreme Court in a case where leave to appeal was refused by the High Court can be filed only within 60 days from the date of the order of refusal. Under section 12 (2) of the Act in computing the period of limitation for an appeal or application for leave to appeal, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or reviewed shall be excluded.

In computing or calculating the period of limitation from a particular point the sub-section enables the exclusion of a time from that period caused by an event that intervened between the commencement and termination of the said period. It has no concern with any events anterior to the commencement of the period of limitation or posterior to the period. The object of the Legislature was to enable a party to exclude the time requisite for obtaining a copy of the order after the period of limitation has commenced. Time taken for obtaining copy of order refusing leave to appeal by the High Court cannot be excluded. Accordingly a petitioner for Special Leave to appeal cannot exclude the time requisite for obtaining copy of the order (sought to be appealed from) before the High Court refused to give leave.

Rule 1 of Order 13 of the Supreme Court Rules was substituted in 1964 on the coming into force of the new Limitation Act (1963) to bring it in accord with the statutory provision—Article 133 (*b*) of the Limitation Act. Even before that by reason of Article 145 of the Constitution the statutory period prevails over the rule made by the Court.

The fact that the petitioner was wrongly informed of the period of limitation cannot possibly be a ground for excusing the delay in filing the Special Leave Petition.

Petition for Special Leave to appeal from the Judgment and Order dated 14th April, 1964, of the Andhra Pradesh High Court in Criminal Revision Case No. 681 of 1963.

T. V. Sarma and *K. R. Sharma* (Advocates with him), for Petitioner.

T. V. R. Tatachari and *B. R. G. K. Achar*, Advocates, for Respondent.

A. Ranganadham Chetty, Senior Advocate (*amicus curiae*).

The Order of the Court was made by

Subba Rao, J.—This is an application for condoning the delay of 62 days in filing the petition for Special Leave to appeal to this Court against the judgment of the High Court of Judicature for Andhra Pradesh at Hyderabad in Criminal Revision Case No. 681 of 1963. On 14th April, 1964, the High Court of Andhra Pradesh delivered judgment in Criminal Revision Case No. 681 of 1963. On 15th April, 1964, the petitioner filed an application in that Court for obtaining a certified copy of the judgment. Stamps were called for on 5th August, 1964, and they were deposited on 6th August, 1964, and the copy was ready on 12th August, 1964. The time taken by the Court for furnishing the copy to the petitioner was about 110 days. The petitioner filed an application in the said Court for leave to appeal to this Court. The said application was dismissed on 14th September, 1964. Before the dismissal of the said application the petitioner obtained the copy of the judgment. Thereafter on 14th January, 1965, the petitioner filed Special Leave Petition (Criminal) No. 169 of 1965 in this Court for Special Leave to appeal to this Court against the judgment of the High Court. As the time for preferring an appeal against the said order of the High Court to this Court is 60 days from the date of the order refusing to give leave to appeal, the petition for Special Leave is time-barred by 62 days. Hence the present application for excusing the delay.

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* P. S. L. A. (Crl.) No. 169 of 1965. 7th May, 1965.

Mr. T. V. Sarma, learned Counsel for the petitioner, raised before us two points, namely, (i) there was no delay at all in filing the petition for Special Leave as his client was entitled to exclude the time required for obtaining the copy of the judgment appealed from, and that, if that time be excluded, the present petition for Special Leave would be within time; and (ii) there is sufficient cause for excusing the delay.

At the outset it will be convenient to notice the relevant provisions of the Limitation Act and the Supreme Court Rules. Order 13 of the Supreme Court Rules prescribes a period of limitation for an appeal by Special Leave to this Court. Rule I thereof, before it was substituted by a new rule in 1964, read thus :

"A petition for Special Leave to appeal shall be lodged in the Court within sixty days from the date of the refusal of a certificate by the High Court or within ninety days from the date of the judgment sought to be appealed from, whichever is longer :

Provided that—

(i) in computing the period of ninety days the time requisite for obtaining a certified copy of the judgment sought to be appealed from shall be excluded :

(ii) where the period of limitation claimed is sixty days from the date of the refusal of a certificate, the time taken subsequent to the date of refusal in obtaining a certified copy of the judgment (in cases where no certified copy of the judgment had been obtained prior to the date of such refusal) shall be excluded in computing the period of sixty days".

Under this rule an appellant who sought to take advantage of the alternative period of limitation could not exclude in computing the period of limitation the time taken by him for obtaining the certified copy of the judgment before the order of refusal of leave to appeal. He could only exclude such time taken for obtaining a copy of the judgment after the said refusal if he had not already obtained the same before such refusal. The Limitation Act of 1963 came into force on 1st January, 1964. Thereunder specific period is prescribed under Article 133 for filing appeals to this Court by Special Leave. Under that article in a case where leave to appeal was refused by the High Court, the period of limitation is sixty days from the date of the order of refusal, and in any other case the period of limitation is ninety days from the date of the judgment or order. While under the Supreme Court Rules, two different periods of limitation were prescribed for filing a petition for Special Leave to appeal to this Court—one of 60 days from the date of the refusal of leave to appeal by the High Court, and the other of 90 days from the date of judgment appealed from, whichever is longer—under Article 133 of the Limitation Act, only one period of limitation is prescribed *i.e.*, 60 days from the date of the order of refusal of leave to appeal by the High Court. By reason of Article 145 of the Constitution of India, the statutory period of limitation prevails over the rule made by this Court. As the rule made by this Court was inconsistent with the statutory provision, that rule was deleted and a new rule was substituted to bring it in accord with the statutory provision. The substituted rule reads:

"Subject to the provisions of sections 4, 5, 12 and 14 of the Limitation Act, 1963 (XXXVI of 1963) a petition for Special Leave to Appeal shall be lodged in the Court in a case where a certificate for leave to appeal was refused by the High Court within sixty days from the date of the order of refusal and in any other case within ninety days from the date of the judgment or order sought to be appealed from."

This rule is only in substance a reproduction of the relevant provisions of the Limitation Act pertaining to the period of Limitation prescribed for an appeal by Special Leave.

The question raised, therefore, falls to be decided on the relevant provisions of the Limitation Act. Under Article 133 (*b*) of the Limitation Act, Special Leave to appeal to this Court in a case where leave to appeal was refused by the High Court can be filed only within 60 days from the date of the order of refusal. Under section 12 (2) thereof, in computing the period of limitation for an appeal or an application for leave to appeal, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or reviewed shall be excluded. It is argued that in terms of sub-section (2) of section 12 of the Limitation Act in computing the period

of limitation for Special Leave to appeal to this Court the time requisite for obtaining the copy of the order appealed from shall be excluded and that this view gets support from the fact that this Court in making the new rule omitted the aforesaid provisos. The omission of the provisos has no bearing on the question to be decided. This Court only substituted a new rule in terms of the provisions of the Limitation Act, for the Rules cannot be inconsistent with the statute. The substituted rule does not serve any other purpose. Now, coming to sub-section (2) of section 12 of the Limitation Act, the object of the said sub-section is clear and it is to enable a party who seeks to file an appeal against an order to obtain a copy thereof, for without such copy he cannot make an effective representation against the validity of the order. For that reason, in computing the period of limitation the time taken for obtaining a certified copy of the order is excluded. It excludes time in the course of computation: it does not add to the period of limitation any period earned earlier. In computing or calculating the period of limitation from a particular point the sub-section enables the exclusion of a time from that period caused by an event that intervened between the commencement and the termination of the said period. It has no concern with any events anterior to the commencement of the period of limitation or posterior to the said period. If time taken for obtaining a copy of the order before the commencement of the period of limitation could be excluded, on the parity of reasoning, time taken for obtaining a copy of the order after the period of limitation also could be excluded. This would lead to an anomalous position: a party can keep quiet till the period of limitation has run out and thereafter, apply for a certified copy of the order and claim to exclude the time taken for obtaining the certified copy of the order from the period of limitation. That could not have been the intention of the Legislature. The object of the Legislature, therefore, was to enable a party to exclude the time requisite for obtaining a copy of the order after the period of limitation has commenced. The phraseology used in sub-section (2) of section 12 of the Limitation Act carries out that object. We, therefore, hold that the petitioner cannot exclude the time requisite for obtaining a copy of the order before the High Court refused to give leave. The petition is clearly out of time.

Coming to the next contention, we are clearly of the opinion that the petitioner had not made out any case for excusing the delay. The only reason he gives in his application for excusing delay is that he thought that the time in obtaining the certified copy of the order refusing leave to appeal to the Supreme Court will be counted for the purpose of calculating the period of limitation for filing the Special Leave petition, as he was wrongly informed of the practice of this Court. The Limitation Act of 1963 came into force on 5th October, 1963. It was more than a year since the Act was passed when the petition was filed in this Court. The vague allegation in the affidavit that the petitioner was wrongly informed of the period of limitation cannot possibly be a ground for excusing the delay. We cannot, therefore, find sufficient reason for excusing the delay in filing the Special Leave Petition.

In the result, the Special Leave Petition is dismissed as out of time.

K.S. *Petition dismissed.*

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